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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 285.

W. O. BOCK, ASSIGNEE OF H. P. LANE, PLAINTIFF IN ERROR,

vs.

GEORGE D. PERKINS, W. H. THRIFT, AND TIMOTHY M. HOPKINS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF IOWA.

FILED OCTOBER 27, 1887.

	Original.	Print.
Bill of exceptions	36	17
Evidence for plaintiff	36	17
Testimony of Henry P. Lane	37	17
W. O. Bock	47	20
Assignment of Henry P. Lane to W. O. Bock, November 20, 1884	57	23
Testimony of W. H. Thrift	66	26
Assignee's notice, December 17, 1884	69	27
Testimony of N. H. Ransom	71	27
W. O. Bock (recalled)	77	29
T. M. Hopkins	80	30
Admissions as to writs of attachment	81	30
Evidence for defendants	84	31
Testimony of T. M. Hopkins	84	31
H. P. Lane	90	33
Admissions as to deeds, &c.	92	33
Testimony of L. G. Hord	107	37
W. O. Bock (recalled)	111	38
T. M. Hopkins (recalled)	112	38
L. G. Hord	117	40
C. E. Wales *et al.*	118	40
W. H. Thrift	120	40
Evidence for plaintiff in rebuttal	122	41
Testimony of W. O. Bock	122	41
H. P. Lane	124	41
Mrs. Anna Lane	126	42
Instructions to jury	129	42
Judge's certificate to bill of exceptions	141	46
Assignment of errors	142	46
Prayer for reversal	148	48
Clerk's certificate	150	49

1 UNITED STATES OF AMERICA, *ss*:

The President of the United States of America to the honorable judges of the circuit court of the United States for the northern district of Iowa, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in said circuit court, before you, between W. O. Bock, assignee & plaintiff, *vs.* Geo. D. Perkins, W. H. Thrift, and Timothy M. Hopkins, defendants, a manifest error hath happened, to the great damage of the said W. O. Bock, assignee, plaintiff, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the 30th day of September, A. D. 1887.

Seal Circuit Court U. S., Northern District of Iowa, Dubuque.

A. J. VAN DUZER,
Clerk U. S. C. C., Northern District of Iowa.
By ALFRED HOBBS, *Deputy.*

Allowed.
O. P. SHIRAS, *Judge.*

Service of above acknowledged at Dubuque, Iowa, this 7th day of October, 1887.

FRANCIS B. DANIELS,
Attorney for Defendants.

[Endorsed:] Filed Oct. 8, 1887. A. J. Van Duzer, clerk.

2 UNITED STATES OF AMERICA, *ss*:

The President of the United States to Geo. D. Perkins, W. H. Thrift, and Timothy M. Hopkins, and Henderson, Hurd & Daniels, their attorneys:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the United States circuit court for the northern district of Iowa, eastern division, wherein W. O. Bock, assignee,

&c., is plaintiff in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at Dubuque, in said district, this 30th day of September, 1887.

Seal Circuit Court U. S., Northern District of Iowa, Dubuque.

O. P. SHIRAS, *Judge.*

Service of above acknowledged at Dubuque, Iowa, this 7th day of October, 1887.

FRANCIS B. DANIELS,
Attorneys for Defendants.

[Endorsed:] Filed Oct. 8th, 1887. A. J. Van Duzer, clerk.

3 UNITED STATES OF AMERICA, *Northern District of Iowa, Eastern Division,* } ss:

Pleas before the circuit court of the United States for the northern district of Iowa, eastern division, at a term begun and holden at the city of Dubuque, in said district, on the first Tuesday in April, A. D. 1886, before Hon. Oliver P. Shiras, judge of the district court of the United States for the northern district of Iowa:

WILLIAM O. BOCK, Assignee of H. P. Lane,
vs.
GEORGE D. PERKINS, W. H. THRIFT, and TIMOTHY HOPKINS. } No. 258. Law.

Be it remembered that heretofore, to wit, on the 7th day of April, A. D. 1885, a transcript was filed in the office of the clerk of this court in the words and figures following, to wit:

STATE OF IOWA, *Dubuque Co.,* } ss:

In District Court. January Term, 1884.

WILLIAM O. BOCK, Assignee of H. P. Lane,
vs.
4 GEORGE D. PERKINS, W. H. THRIFT, TIMOTHY HOPKINS. } Petition.

William O. Bock, plaintiff in this suit, by Fouke & Lyon, his attorneys, claims of the defendants, George D. Perkins, William H. Thrift, and Timothy Hopkins, the sum of ten thousand dollars, and for cause of claim states that heretofore, to wit, on the 20th day of November, A. D. 1884, one H. P. Lane made and executed to plaintiff in writing a general assignment under the laws of this State for the benefit of all of his creditors, which assignment was properly recorded, and on the same day plaintiff duly qualified as such as-

signee and took possession of all the property of said Lane, including the property hereinafter mentioned, as such assignee.

That afterwards, to wit, on or about the 26th of November, A. D. 1884, while said plaintiff was in the legal and actual possession of said property, the defendants wrongfully and illegally took possession of a large amount of the same, to wit, all of the property in possession of plaintiff as such assignee, consisting of a general stock of merchandise, including dry goods, groceries, hardware, hats, and caps, all of the value of ten thousand dollars, and then
5 and there wrongfully converted the same to their own use, to the damage of plaintiff of ten thousand dollars; for which sum, with costs, plaintiff asks judgment against said defendants.

FOUKE & LYON,
S. H. KINNE,
Att'ys for Pl'ff.

Original Notice.

To George D. Perkins, Wm. H. Thrift, and Timothy Hopkins:

You are hereby notified that on the 18th day of December, A. D. 1884, there will be on file in the clerk's office of the district court of the State of Iowa, in and for Dubuque county, the petition of William O. Bock, assignee of H. P. Lane, claiming of you ten thousand dollars and interest at — p'r cent. per annum from ——, 18—, as money due for wrongfully taking and converting to your own use a stock of merchandise belonging to and in possession of plaintiff, as by said petition will more fully appear, and that unless you appear thereto and defend before noon of the next January term of said court—that is to say, before noon of the 6th day of January, A. D. 1885—default will be entered against you and judgment rendered thereon.

FOUKE & LYON &
S. H. KINNE,
Attorneys for Plaintiff.

6 We hereby admit due and legal service of the within notice at Dubuque, in Julien township, in Dubuque county, State of Iowa, this 18th day of December, A. D. 1884.

GEO. D. PERKINS,
U. S. Marshal,
By W. H. THRIFT,
His Agent.
W. H. THRIFT.
T. M. HOPKINS.

"On the 17th day of January, A. D. 1885, a motion was filed in said cause in words and figures as follows:

In District Court of Iowa in and for Dubuque County.

WILLIAM O. BOCK, Assignee of H. P. Lane,
vs.
GEORGE D. PERKINS, W. H. THRIFT, & TIMOTHY HOPKINS. } Motion.

I.

Defendants move that the plaintiff be required to make his petition more definite and certain, in this, that he be required to state whether the acts complained of were done all at the same time as one act and whether defendants took possession at one time or upon one occasion of all the property now sued for.

II.

And that plaintiff be required to state whether it be not true that the acts and the taking possession complained of were at
7 several times and upon several occasions; and, if so, that plaintiff be required to state the description and value of the property and damage pertaining to each separate act or occasion or alleged trespass now sued for.

III.

And that if plaintiff now seeks to recover for only one act or for property taken at only one time or occasion that he be required to set out in detail the description of such property, with its value.

IV.

And that if plaintiff seeks in this action to recover on account of different items of property taken at different times upon different occasions he be required to divide his petition unto counts, in which the property in each case shall be described, or which shall otherwise clearly distinguish the separate alleged causes of action from each other.

HENDERSON, HURD & DANIELS,
Attorneys for Defendants."

And on the same day, to wit, January 17, 1885, a petition and bond was filed in said cause in words and figures following, to wit:

In the District Court of the State of Iowa in & for Dubuque Co.

WILLIAM O. BOCK, Assignee of H. P. LANE,
Plaintiff,
vs.
8 GEORGE D. PERKINS, W. H. THRIFT,
TIMOTHY HOPKINS, Defendants. } Petition for Removal to the Circuit Court of the United States.

To said district court of the State of Iowa:

Your petitioners, George D. Perkins, W. H. Thrift, and Timothy Hopkins, defendants in the above-entitled suit, respectfully shows that this is a suit where the matter in dispute exceeds, exclusive of

costs, the sum or value of five hundred dollars and arising under the laws of the United States, some of the particulars thereof and of the matter out of which the same arises being set forth in the affidavit of said W. H. Thrift, hereto attached and made a part hereof and marked Exhibit "A."

And petitioners file herewith a bond, with good and sufficient surety, for their entering in the circuit court of the United States to be held in the northern district of Iowa, where this suit is pending, on the first day of its next session a copy of the record in this suit, and for paying all costs that may be awarded by the said circuit court of the United States if said court shall hold that this suit was wrongfully or improperly removed thereto, and also for their appearing and entering special bail in this suit if special bail was originally requisite herein; and petitioner prays that
9 this court accept this petition and said bond, order the removal of this suit unto the said circuit court of the United States, and proceed no further herein.

HENDERSON, HURD & DANIELS,
Attorneys for Petitioner.

EXHIBIT A.

In District Court of Iowa in and for Dubuque County.

WILLIAM O. BOCK, Assignee of H. P. Lane,
vs.
GEORGE D. PERKINS, W. H. THRIFT, TIMOTHY HOPKINS. } Affidavit.

STATE OF IOWA,
Dubuque County, } *ss:*

I, W. H. Thrift, being duly sworn, depose and say that I am one of the defendants in the above-entitled action and have knowledge of all the allegations of the petition in said action and of the facts out of which said action has arisen; and I further say that at the times mentioned in said petition defendant, George D. Perkins, was and still is the marshal of the United States for the northern district of Iowa, and defendant, W. H. Thrift, was and now is his deputy, and defendant, Timothy Hopkins, then was and now is a special deputy of said marshal; that the said Perkins never took or had possession of any of the property mentioned in said petition nor did any act therein complained of; that the only defendants who ever
10 took possession of any of said property or did any act complained of in said petition or had any personal connection with any of the acts complained of are the said Thrift and the said Hopkins, and that the said Perkins can be held liable to plaintiff in this action only by reason of his responsibility under the laws of the United States for the acts of his deputies; that the only taking or possession or other act complained of was done under and by virtue of certain writs of attachment issued out of the circuit court of the United States for the northern district of Iowa in certain actions therein pending against H. P. Lane and directed to said

Perkins as marshal as aforesaid; that in this action plaintiff seeks to recover of defendants, being the marshal of the United States for the northern district of Iowa, and his deputies damages for a pretended trespass in seizing by said deputies certain goods claimed by plaintiff to belong to him under writs of attachment issued from the United States circuit court in and for said district against other persons than plaintiff, and that the acts and doings of defendants under said writs and the laws of the United States applicable thereto
11 constitute grounds of the liability claimed by plaintiff in this action and are relied on by defendants for their defense.

W. H. THRIFT.

Subscribed and sworn to by said W. H. Thrift before me,
[SEAL.] a notary public of Iowa in and for said Dubuque county, this 7th day of Jan'y, 1885.

LOUIS G. HURD,
Notary Public.

Know all men by these presents that George D. Perkins, W. H. Thrift, and Timothy Hopkins, as principals, and J. K. Deming, as surety, are held and firmly bound unto William O. Bock, assignee of H. P. Lane, in the penal sum of five hundred dollars, upon the following express conditions: Whereas the said principals have petitioned the district court of the State of Iowa in and for Dubuque county for the removal of a certain cause therein pending, wherein William O. Bock, assignee of H. P. Lane, is plaintiff and George D. Perkins, W. H. Thrift, & Timothy Hopkins, defendants, into the circuit court of the United States, to be held in the northern district of Iowa:

Now, therefore, if the said principal- shall enter in such circuit court of the United States on the first day of its next session a copy of the record in such suit and shall pay all costs that may be awarded by the said circuit court of the United States if
12 said court shall hold that such suit was wrongfully or improperly removed thereto, and also shall then appear and enter special bail in such suit, if special bail was originally requisite therein, then this obligation shall be void; otherwise of force.

Witness our hands this 17th day of January, 1885.

GEORGE D. PERKINS,
W. H. THRIFT, &
TIMOTHY HOPKINS, *Principals,*
By HENDERSON, HURD & DANIELS,
Their Attorneys.

J. K. DEMING, *Surety.*

STATE OF IOWA, }
County of Dubuque, } *ss:*

I, J. K. Deming, being duly sworn, depose and say that I am surety on the foregoing bond; am a resident of the State of Iowa; am worth the sum of one thousand dollars beyond the amount of

my debts, and have property liable to execution in the State of Iowa equal to the sum of five hundred dollars.

J. K. DEMING.

Subscribed & sworn to by said J. K. Deming before me, a notary public in and for said State and county, this 17 day of January, 1885.

[SEAL.] F. K. DANIELS,
Notary Public.

And afterwards, to wit, on the 17th day of January, 1885, a motion was filed in said cause in words and figures following, to wit:

STATE OF IOWA, }
13 *Dubuque Co.* }

In District Court. January Term, 1885, A. D.

WILLIAM O. BOCK
vs.
GEORGE D. PERKINS, W. H. THRIFT, & T. M. HOPKINS. } Motion.

And now comes plaintiff and moves to strike from the files the affidavit of W. H. Thrift, attached to the petition for removal, because:

1st. The facts giving the right of removal must appear from the face of the record itself.

2nd. No affidavit can be received to show the subject-matter of the controversy contrary to the allegations of the petition or in addition thereto.

3rd. The facts stated do not show that said action arises under the Constitution and laws of the United States.

4th. Said affidavit is otherwise insufficient and informal.

FOUKE & LYON, *For Pl'ff.*

And afterwards, to wit, on the 13th day of February, 1885, the following proceeding was had in said cause:

In District Court, Dubuque County, Iowa.

FRIDAY, *February 13th, A. D.* 1885.

WM. O. BOCK, Assignee, &c.,
vs.
GEO. D. PERKINS *et al.* } 6859. Law. Removed to U. S. C. C.

14 This cause now coming on to be heard upon the petition by defendants for removal of the cause to the U. S. circuit court, the bond, being filed, is approved, and the motion by plaintiff to strike petition & affidavit, being submitted, is by the court overruled & petition granted, to which the plaintiff excepts. It is therefore ordered by this court that this cause be, and the same is hereby, removed to the circuit court of the United States, northern district,

eastern division of Iowa, and that the clerk of this court forward to the clerk of said U. S. circuit court a transcript of the papers & record entries herein upon the defendants paying the costs occasioned by said removal; to which plaintiff excepts.

STATE OF IOWA, *Dubuque County,* } *ss:*

I, J. J. Dunn, clerk of the district court of the State of Iowa in and for Dubuque county, do certify that the annexed and foregoing is a full, true, complete, and compared transcript of the records, pleadings, and papers therein set forth in the case therein mentioned, wherein William O. Bock, assignee, &c., was plaintiff and George D. Perkins *et al.* were defendants, as fully as the
15 same appears of record and on file in my office.

In testimony whereof I have hereunto set my hand and caused the seal of said court to be affixed, at Dubuque city, this 4th day of March, A. D. 1885.

[SEAL.] J. J. DUNN, *Clerk.*

And afterwards, on the — day of ——, A. D. 188–, the plaintiff filed in this court his motion to remand as follows:

UNITED STATES OF AMERICA, *Northern District of Iowa.*

W. O. BOCK
vs.
GEORGE D. PERKINS *et al.*

And now comes plaintiff and moves to remand this case to the State court for the following reasons:

1st. No question arising under the Constitution or laws of the United States is involved in this controversy.

2nd. After a trial had upon the pleadings in this case it has been demonstrated that the cause is not one over which a Federal court has jurisdiction.

16 3rd. A defense by a marshal under process is not, even if it appeared in this case, sufficient to give this court jurisdiction.

FOUKE & LYON, *For Pl'ff.*

And afterwards, on the 4th day of December, A. D. 1885, the defendants filed their answer as follows:

In Circuit Court of the United States for the Northern District of Iowa, Eastern Division.

WILLIAM O. BOCK, Assignee of H. P. Lane, *vs.* GEORGE D. PERKINS, W. H. THRIFT, TIMOTHY HOPKINS.	No. 261. Law.

I.

Defendants, for answer to the petition herein, deny each and every allegation thereof.

II.

And, further answering said petition, these defendants say that the alleged general assignment was not made for the benefit of all the creditors of the said H. P. Lane in proportion to the amount of their respective claims, and further say that the same was accompanied and preceded by preferences made by said Lane when insolvent and in contemplation of insolvency and in contem-
17 plation of said alleged general assignment and intended to be a part thereof, and intended to prevent said alleged general assignment from operating as a general assignment of property by said Lane for the benefit of all his creditors in proportion to the amount of their respective claims.

FRANCIS B. DANIELS,
Attorney for Defendants.

And afterwards, to wit, on the 16th day of January, A. D. 1886, the defendant Perkins filed an amendment to his answer as follows:

Circuit Court of the United States for the Northern District of Iowa, Eastern Division.

WILLIAM O. BOCK, Assignee of H. P. Lane, *vs.* GEORGE D. PERKINS, W. H. THRIFT, TIMOTHY HOPKINS.	No. 261. Law. Amendment to Answer of George D. Perkins.

Comes now the defendant, George D. Perkins, and by leave of court amends his answer and for further answer to the petition herein says:

1st. That at all the times mentioned in the petition he was the marshal of the United States for this district and the defendants, Thrift and Hopkins, were his deputies, and the property described in the petition was in this district.

2nd. That he, Perkins, never took or had possession of any
18 of said property, nor had any personal participation whatever in any of the acts complained of by plaintiff nor directed any of said acts nor knew of any of said acts until long after their occurrence.

3rd. That the only defendants who ever took possession of any of said property or did any act complained of or had any personal connection with any of said acts are the defendants Thrift and Hopkins.

4th. That, notwithstanding the general nature of the allegations of the petition, the plaintiff does not claim and will not try to prove that this defendant, Perkins, ever took or had possession of any of said property or had any personal participation whatever in any of the acts complained of by plaintiff or directed any of said acts or knew of any such acts until long after their occurrence.

5th. That plaintiffs only claim against this defendant, and the only claim that plaintiff will try to prove against this defendant to this action is that defendants Thrift and Hopkins, as the deputies of this defendant as marshal as aforesaid, took and converted the said property under certain writs of attachment issued out of this court against the property of H. P. Lane, named in the
19 petition, and not against the property of plaintiff and in the hands of said deputies for service, and that this defendant is liable to plaintiff in this action only because under the laws of the United States he is liable for such acts of his deputies.

6th. And this defendant says he is not so liable, for that under the laws of the United States (his relation to the matters complained of being as stated under 2nd above) he is not liable to plaintiff for the acts of his deputies in taking and converting property of the plaintiff under said writs of attachment against the property of said Lane or in otherwise departing from the commands of said writs.

IV.

And this said defendant Perkins, further answering said petition, says:

1st. He denies the words "general assignment," which assignment was properly recorded "legal," "wrongfully," and "illegally," wherever occurring in said petition, and denies each and every allegation contained or implied in said words or either of them.

2nd. He repeats and makes a part of this division the first five paragraphs of division III above.

3rd. He says he is not so liable to plaintiff in this case, for that said property was at the time the property of said Lane and not the property of plaintiff, and under the laws of the United States was liable to be taken upon said writs.

HENDERSON, HURD & DANIELS,
Attorneys for Defendant Perkins.

20 And afterwards, on the said 16th day of January, A. D. 1886, the defendants Thrift and Hopkins filed their amendment to answer as follows:

Circuit Court of the United States for the Northern District of Iowa, Eastern Division.

WILLIAM O. BOCK, Assignee of H. P. Lane, *vs.* GEORGE D. PERKINS, W. H. THRIFT, TIMOTHY HOPKINS.	No. 258. Amendment to Answer of W. H. Thrift and Timothy Hopkins.

Come now the defendants, W. H. Thrift and Timothy Hopkins, — by leave of court amend their answer, and for further answer to the petition herein say:

III.

1st. They or either of them did not, *not* on or about the 26th day of November, 1884, or at any other time, take possession of or convert the stock of merchandize referred to in said petition or any thereof except as hereinafter stated, nor did *he* any of the acts complained of in the petition or hereinafter men*ten*tioned occur elsewhere than in this district.

2nd. At the time of all the — herein mentioned defendant Perkins — United States marshal for this district and defendants Thrift and Hopkins — his deputies.

21 3rd. On the 26th day of November, 1884, defendant and Hopkins, having in *his* hands for service — writ of attachment against the property of H. P. Lane, named in said petition, duly issued out of the office of the clerk of this court in this devision of this district, in a suit then herein pending entitled claims, P. Kellogg & Co. *et al.*, plaintiffs — H. P. Lane, defendant, commanding the attachment of s- much of the property of said H. P. Lane, defendant, as might be necessary to satisfy the sum of 773.50, with interest and costs, did in good faith levy the said attachment on certain personal property of about the value of 765.54 that they had reason to believe belonged to said defendant Lane and on which the plaintiffs in said suit directed *him* to levy, which personal property, as these defendants are informed and believe, was a part of said stock of merchandize.

4th. Said property was not taken by defendants or either of them otherwise than in such levy, and was not *created* or disposed of by defendants, neither of them, otherwise than under

22 said attachment, in the manner provided by law for the disposition of said att-ched property.

5th. This plaintiff was personally present at the levy on said property as aforesaid, and before and at the time of said levy was fully informed of said writ of attachment; that defendant Hopkins was the officer afor-said proceeding thereunder and about to levy and levying the same and clear. Said property was about to be levied on and was levied on under said attachment, and this plaintiff was at all times fully informed of the official character of all the defendants as aforesaid.

6th. But neither of the defendents at any time before or during the acts above set forth or the acts complained of in the petition re-

ceived the notice provided for in chapter 45 of the laws of the General Assembly of the State of Iowa, or any notice in writing under oath from plaintiff, his agent or attorney, that said property belonged to him in any notice which may have been intended to comply
23 with said chapter, but plaintiff personally aided the defendant Hopkins in taking the said property in said levy and personally aided in the disposition of said property under said attachment.

7th. Wherefore these defendents, Thrift and Hopkins, say that so far as said property is concerned defendants are not liable to plaintiff for the acts complained of in the petition, and, further, that plaintiff is estopped to maintain this action therefor.

8th. On the 26th day of November, 1884, defendant Hopkins, having in his hands for service a writ of attachment against the property of said Lane duly issues out of the office of the clerk of this court in this division of this district, in a suit then herein pending entitled M. D. Wells & Co. *et als.*, plaintiffs, — H. P. Lane, defendant, commanding the attachment of so much of the property of said H. P. Lane, defendant, as might be necessary to satisfy the sum of 1,338.92, with interest and costs, did in good faith levy the said attachment on certain personal property of about the value — 1,147.62 that he had reason to believe belonged to said defend-
24 ant Lane, and on which the plaintiffs in said suit directed him to levy, which personal property, as these defendants are informed and believe, was a part of said stock of merchandise which was other than and entirely distinct from the property levied on as aforesaid under the attachment in the suit entitled claims, P. Kellogg & Co., plaintiffs, *and* H. P. Lane, defendant.

9th. Said property levied on in the suit entitled M. O. Wells & Co. *et als.*, plaintiffs, *vs.* H. P. Lane, defendant, was not taken by defendants or either of them otherwise than in said levy, and was not treated or disposed of by defendants or either of them otherwise than under said attachment in the manner provided by law for the disposition of such attached property.

10th. This plaintiff was personally present at the levy on said property as aforesaid, and before and at the time of said levy was fully informed of said writ of attachment; that defendant Hopkins was the officer as aforesaid proceeding thereunder and about to levy and levying the same, and that said property was about to — levied on and was levied on under said attachment, and this
25 plaintiff was at all times fully informed of the official character of all the defendents as aforesaid.

11. But neither of the defendants at any time before or during the acts above set forth or the acts complained of in the petition received the notice provided for in chapter 45 of the Laws of 20th General Assembly of the State of Iowa or any notice in writing, under oath, from plaintiff, his agent or attorney, that said property belonged to him, any notice which may have been intended to comply with said chapter; but plaintiff personally aided the defendant Hopkins in taking the said property in said levy and

personally aided in the disposition of said property under said attachment.

12. Wherefore these defendants, Thrift and Hopkins, say, so far as said property is concerned, defendents are not liable to plaintiff for the acts complained of in the petition, and further say that plaintiff is estopped to maintain this action. Therefore—

13. On the 27th day of November, 1884, defendant Thrift,
26 having in his hands for service a writ of attachment against the property of said Lane, duly issued out of the office of the clerk of this court in this division of this district, in suit then herein pending entitled Henry W. King & Co. *et als.*, plaintiffs, *vs.* H. P. Lane, defendant, commanding the attachment of so much of the property of said H. P. Lane, defendant, as might be necessary to satisfy the sum of 1,032.75, with interest and costs, did in good faith levy the said attachment on certain personal property of about the value of $984.69 that he had reason to believe belonged to said defendant Lane and on which the plaintiffs in said suit directed him — levy, which personal property, as these defendents are informed and believe, was a part of said stock of merchandize, but which was other than and entirely distinct from the property levied on as aforesaid under the attachments in the suit entitled Charles P. Kellogg & Co. *et als. vs.* H. P. Lane, defendant, and M. D. Wells & Co. *et al.*, plaintiffs, *vs.* H. P. Lane, defendant.

14. Said property levied on in the suit entitled Henry W. King & Co. *et als.*, plaintiffs, *vs.* H. P. Lane, defendant, was not taken by defendants or either of them otherwise than in such levy, and
27 was not treated or disposed of by defendants or either of them otherwise than under said attachment in due manner provided by law for the disposition of such attached property.

15. This plaintiff was personally present at the levy on said property as aforesaid, and before and at the time of said levy was fully informed of said writ of attachment; that defendant Thrift was the officer as aforesaid proceeding thereunder and about to levy and levying the same, and that said property was about to be levied on and was levied on under said attachment, and this plaintiff was at all times fully informed of the official character of all the defendants as aforesaid.

16th. But neither of the defendants at any time before or during the acts above set forth or the acts complained of in the petition received the notice provided for in chapter 45 of the laws of the 20th General Assembly of the State of Iowa or any notice in writing under oath from plaintiff, his agent or attorney, that said property belonged to him or any notice which may have been
28 intended to comply with said chapter, but plaintiff personally aided the defendant Thrift in taking the said property in said levy and personally aided in the disposition of said property under said attachment.

17. Wherefore these defendants, Thrift and Hopkins, say that so far as said property is concerned defendants are not liable to plaintiff for the acts complained of in the petition, and further say that plaintiff is estopped to maintain this action therefor.

18th. And upon the facts above stated as a whole they each say that defendants are not liable to plaintiff for the acts complained of in the petition, and further say that plaintiff is estopped to maintain this action therefor.

29 And these defendants, Thrift and Hopkins, further answering said petition, say:

1st. They deny the words general assignment, which assignment was properly recorded legal, wrongfully and illegally, wherever occurring on said petition, and deny each and every allegation contained or implyed in said words or either of them.

2d. They repeat and make a part of this division the paragraphs of division III above numbered 1st, 2nd, 3rd, 4th, 8th, 9th, 13th, 14th.

3rd. They say that said property was at the time refer-ed to the property of said Lane and not the property of the plaintiff, and was liable to be taken under the writs of attachment described.

4th. They say that in taking said property they were respectively executing the commands of said respective writs and the laws of the United States authorizing the same.

HENDERSON, HURD & DANIELS, *Att'ys.*

And afterwards, on the 9th day of April, A. D. 1886, there was filed the following verdict, rendered by order of said court, to wit:

30 United States Circuit Court, Northern District of Iowa, Eastern Division.

WM. O. BOCK, Assignee, &c., Plaintiff,
vs.
GEO. D. PERKINS, W. H. THRIFT, and TIMOTHY HOPKINS, Defendants.

We, the jury, by the direction of the court, find our verdict for the defendants.

A. M. MAY, *Foreman.*

And afterwards, on the 10th day of April, 1886, there was filed by plaintiff the following motion for a new trial.

31 In U. S. Cir. Court. April Term, 1886.

UNITED STATES OF AMERICA,
Northern District of Iowa, Eastern Division.

W. O. BOCK
vs.
GEO. D. PERKINS. } Motion for New Trial.

And now comes the plaintiff and moves the court for a new trial for the following reasons:

1st. The verdict is contrary to the evidence.

2nd. The verdict is contrary to law.

3rd. The court erred in directing the jury to find a verdict for the defendants.

4th. The court erred in directing the jury that the general assignment offered in evidence did not convey to plaintiff the stock of goods in controversy.

5th. The court erred in — from the jury and refusing to allow in evidence to be considered by the jury the general assignment offered in evidence by plaintiff, as shown by the bill of exceptions and the charge of the court.

6th. The court erred in directing the jury as a matter of law that the execution of the general assignment and the mort-
32 gage & deeds of —— —— in evidence by plaintiff were one and the same transaction, or part of the same transaction, which rendered assignment void.

7th. The court erred — finding and holding as matter of law that the assignment offered in evidence was void as being a part of a series of assignment- which rendered this general assignment void.

8th. The court erred in not submitting to the jury the question of when said assignment was executed and whether or not the assignment was a part of the several conveyances offered in evidence and intended to be executed as one and the same transaction.

FOUKE & LYON,
Att'ys for Plaintiff.

33 U. S. Circuit Court, Northern District of Iowa, Eastern Division. April Term, 1886.

W. O. Bock, Assignee, &c.,
vs.
Geo. D. Perkins, W. H. Thrift, and T. M. Hopkins. } No. 258. Law.

Thursday, *8th Day of April*, 1886.

This cause coming on to be heard, the plaintiff appearing by Fouke & Lyon, his attorneys, and the said defendants by Henderson, Hurd & Daniels, their attorneys, thereupon came a jury of twelve good and lawful men, citizens of the district, to wit, A. M. May, J. O. Johnson, George Kerr, Daniel Sheehan, W. A. Benton, J. Williams, M. F. Desty, H. S. Blocker, William Danforth, A. J. Donaldson, Kneed Alfsen, and Richard Hodge, — were duly empannelled, tried, and sworn well and truly to try the issue joined and a true verdict to give according to the law and the evidence. The hearing of the evidence was not concluded at the hour of adjournment.

34 And afterwards, to wit, on Friday, 9th day of April, 1886, an entry appears of record in the words and figures following, to wit:

W. O. BOCK, Assignee, &c.,
vs.
GEO. D. PERKINS, W. H. THRIFT, and T. M. HOPKINS. } No. 258. Law.

This cause again coming on to be heard, the attorneys and jurors being all present and the evidence and the arguments of counsel having been heard, the cause was submitted to the jury by the court, and the jury, under the instructions of the court, returned the following verdict:

"W. O. BOCK, Assignee, Plaintiff,
vs.
"GEO. D. PERKINS, W. H. THRIFT, and TIMOTHY HOPKINS, Defendants.

"*Verdict.*

"We, the jury, by the direction of the court, find our verdict for the defendants.

"A. M. MAY, *Foreman.*"

The plaintiff thereupon filed a motion for a new trial and tendered his bill of exceptions, which is signed by the court and ordered to be made part of the record.

35 And afterwards, to wit, on the 22nd day of April, A. D. 1886, an entry appears of record in the words and figures following, to wit:

W. O. BOCK, Assignee, &c.,
vs.
GEO. D. PERKINS, W. H. THRIFT, and T. M. HOPKINS. } No. 258. Law.

This cause coming before the court upon defendants' motion for judgment upon the verdict of the jury heretofore rendered, and the court being now fully advised in the premises—

It is ordered and considered by the court that the defendants have and recover of and from the said plaintiff, W. O. Bock, assignee, and from J. M. Tartt, of New Albin, Iowa, his surety upon the cost bond filed herein, for their costs in this behalf, together with the costs of this proceeding, taxed at $—, and that execution issue therefor.

It is further ordered by the court that the motion for a new trial stand as an application to vacate judgment and for a new trial, to be heard at Des Moines, and entry to be made as of this term.

And afterwards, the said motion for a new trial having been heard before the full bench, the same was overruled.

36 In United States Circuit Court for Northern District of Iowa, Eastern Division. April Term, 1886.

W. O. Bock, Assignee of H. P. Lane,
vs.
Geo. D. Perkins, W. H. Thrift, T. M. Hopkins. } Law. Bill of Exceptions.

Be it remembered that on the 8th day of April, 1886, this cause came on for trial before the court & jury upon the issues joined therein, and a jury of twelve men having been duly called & sworn, thereupon the plaintiff, to sustain the issues on his behalf, introduced the following evidence:

37 Henry P. Lane, called as a witness for plaintiff, being sworn, testified as follows:

Q. Where do you live?
A. New Albin, Allamakee Co., Iowa.
Q. How long have you lived there?
A. Twenty years.
Q. How long were you in business?
A. Ten years.
Q. Were you engaged in mercantile business in Nov., 1884?
A. Yes, sir.
Q. Do you know S. H. Kinne, of Lansing?
A. Yes, sir.
Q. Will you state whether you employed him to draw up for you an assignment of your property?
A. I did.
Q. What instruction, if any, did you give him as to what property you intended to assign? Now, state whether you gave any
38 instructions; if so, were they oral or in writing?
A. I did.
Q. Mr. Lane, are these the papers that were executed at that time by you (showing him the alleged assignment)?
A. Yes, sir.
Q. Where was this paper executed?
A. At Lansing, in Mr. Kinne's office.
Q. On the day that appears here?
A. Yes, sir.
Q. Who was present at the time it was executed?
A. Mr. Kinne, Mr. Bock, myself, & I think Mr. Burfrey.
Q. Where was your stock of goods at that time?
A. At New Albin.
Q. After this paper was signed and acknowledged by you, then what was next done?
A. Mr. Bock closed the store and inventoried the goods.
Q. What next was done after the paper was signed?
A. Mr. Bock went to Waukon & placed it on record.
39 Q. He went to place it on record? You didn't go with him?

A. Yes, sir; I did; me & him. I got to New Albin first.
Q. Well, what next?
A. He closed the store.
Q. You got first to New Albin, you say?
A. Yes.
Q. What was done with the stock there, so far as you are concerned and so far as Bock is concerned?
A. Bock took possession. I gave him possession.
Q. For what purpose did you give him possession, if any, & under what agreement did you give him possession, if any?

Objected to by defendants as immaterial, incompetent, and hearsay. Overruled and exceptions taken by defendants.

A. I gave him possession for the purpose of selling the goods and dividing the proceeds among the creditors under the contract that that instrument was shown up under & gave him possession.
40 Q. Well, I'll ask you what Mr. Bock did after he had taken possession of the stock of goods—whether he made an inventory or not?
A. He took possession of the whole stock of goods, closed up the store, & had commenced to take an inventory & he was taking an inventory the last that I know of the matter.
Q. Do you know of your own knowledge how long he remained in possession?
A. No, sir.
Q. Do you recollect what month it was?
A. I think it was the 20th of November, 1884; yes, sir.

Cross-examination:

Q. You say you gave Mr. Bock possession of these goods?
A. Yes, sir.
Q. How did you do it?
A. I told him to take possession of the goods.
41 Q. Where was this?
A. In Mr. Kinne's office, at Lansing.
Q. Didn't you give him the store and deliver the keys over to him there?
A. No, sir; I did not.
Q. You say you went to Waukon?
A. Yes, sir.
Q. Then what did you do?
A. I drove a team over to Waukon & put the papers on record.
Q. After you got through at Waukon, then where did you go?
A. I went back to New Albin.
Q. Did Bock come with you?
A. No, sir.
Q. What time of the night did you get back to New Albin?
A. About 7 o'clock—between 7 & 8.
Q. When did he take possession of the store?
A. Before I got back to New Albin.

Q. Before you got to New Albin?
A. Yes, sir.
Q. How?
A. By telegraph.
Q. Then, didn't you go to the store with him to deliver him possession?
42 A. No, sir; I don't think I did that night; the store was all shut up when I got there.
Q. You say it was at Kinne's office, in Lansing, that you gave him possession?
A. Yes, sir.
Q. What did you say to him about taking possession of the real estate?
A. Never said anything about it.
Q. What did you say about taking possession of the accounts and notes?
A. I don't think I mentioned anything about them.
Q. What did you say to him?
A. I told him—I can't give exact language—says I, do the best you can with the stock and get the most out of — you can for the creditors. I think those were the exact words I used when I gave him the instrument of assignment.
Q. This, you say, you said to him when you handed him the assignment at Kinne's office?
43 A. I didn't hand it to him. I said that to him when I signed it.
Q. Who handed it to him?
A. I don't know.
Q. You don't know how he got possession of it?
A. I don't know whether I handed it to him or whether Kinne handed it to him.
Q. Who did the buying of goods for you and who attended to the details of the business?
A. Mr. Bock.
Q. He was running the business up to the time of the assignment, wasn't he?
A. Yes, sir.
Q. When you went over to Waukon with the assignment you took over some other papers for record, too, didn't you?
A. Yes, sir.
Q. And filed them for record at the same time that you filed this assignment—at the same time the assignment was handed in?
44 A. I don't know when the assignment went in.
Q. You & Bock went up there together, didn't you?
A. Yes; we went up together. I went up to the recorder's office ahead of him.

Re-examination by the plaintiff:

Q. What property, if any, did you have left after you had executed this assignment & after Mr. Bock had taken possession under this paper that you call a general assignment?

A. I had no property remaining.

45 Q. State all the conversation you had there, so that the jury will know what you refer to. What was said about these goods—when he would get home what to do? What goods you were talking about—if it was this stock? State to the jury all that was said at the time as to the stock of goods.

A. Well, the substance or the language was: I says, "Will, you go & take charge of the business & Mr. Kinne will counsel you, & I would advise you to put these goods down a little above cost, & also sort up from time to time, & try & get closed out by April 1st;" & said something about the outstanding debts, & told him to be diligent in collecting them.

Q. Who was Will?

A. Mr. Bock.

46 Q. What business had you been engaged in that Mr. Bock was running for you previous to the time this written instrument was made?

A. I was engaged in mercantile business at New Albin.

Q. Had he been running this business for you?

A. Yes.

Q. Was there any other business that he was engaged in for you to which this conversation could refer to except this business?

A. No, sir.

Recross-examination:

Q. Mr. Bock had been clerking for you up to that time?

A. Yes.

Q. Running the business under your direction?

A. No, sir; under his own direction.

Q. Did you ever give him any directions?

A. When up there?

Q. Yes; up there.

A. None. I told him to take charge of the business & run it as he deemed best.

47 Q. You never gave him any directions or advised as to how he should keep the stock?

A. No, sir.

Q. On this 20th of Nov. you told him that he had better close it up by the first of next April?

A. That was my advice to him then.

WM. O. BOCK, the plaintiff, being sworn in his own behalf as plaintiff:

Q. Where do you live?

A. At New Albin, Iowa; have lived there 13 years.

Q. What is your business?

A. Mercantile business.

Q. You have been for the past 12 years?

A. Yes.

Q. What were you engaged in doing previous to 20th Nov., 1884, and where?

48 A. I was engaged by Mr. Lane in mercantile business at New Albin.

Q. Did you go to Lansing on or about 20th Nov. with Mr. Lane or did you find Lane there, and what did you do in regard to an assignment of his property?

A. We both went together.

Q. Was there a paper executed by Mr. Lane at that time?

A. Yes, sir.

Q. Is this the paper (showing him the assignment)?

A. Yes.

Q. I will ask you if after it was acknowledged the paper was delivered to you; if so, by whom?

A. I can't say who delivered it to me, but I received it in Mr. Kinne's office.

Q. Did you accept the trust? Is that it?

49 A. Yes, sir; that is my signature. I took possession of the goods at New Albin.

Q. Did you go & have the paper recorded first?

A. Yes.

Q. Where was that?

A. We started from Lansing & then went to Waukon & then to New Albin. We went from Waukon to New Albin.

Q. After you got back to New Albin what did you do?

A. Took inventory of the stock of goods owned by Mr. Lane.

Q. Was it the same or different stock from the one that you were doing business with for Mr. Lane previous to the time the assignment was made?

A. The same stock.

Q. State what you did towards taking possession & what you did with the goods.

50 A. I took possession of the stock of goods; took an inventory of them with the clerk, opened up the store, & commenced selling the goods.

Q. How long did that continue?

A. I hadn't opened up one day when the marshall came up. He, the marshall, came up on the 26 of November.

Q. Who came up?

A. A Mr. Hopkins.

Q. What did he say he came for?

A. He came in and said he had papers to serve on that stock of goods. I told him I guessed he had better not.

Q. What conversation did you have upon the subject?

A. I told him he was rather late; the goods were all mine—all assigned to me. He said that he understood about the assignment, & he wanted me to accept service.

Q. Did you show him this assignment?

51 A. Yes, sir.

Q. And he said that he wanted me to accept service?

A. Yes, sir; that was all that was said then.

Q. When did you next see him?

A. He stayed there & demanded the keys. I gave him my key

and he hunted up the clerk & got his key & locked the door. We all went out.

Q. Did you ever have possession of that store afterwards?

A. No, sir; never. The stock of goods were in there when he demanded possession and took possession.

Q. Did you ever have that stock of goods tendered to you afterwards?

A. No, sir.

Q. What was the value of the goods that Mr. Hopkins took possession of?

A. I put them between 8,000 & 9,000 dollars. I should
52 judge near 8,500 dollars was the amount. I was familiar with the stock and had just finished the inventory before Mr. Hopkins came up there.

Q. When you took possession of the goods under & by what authority did you claim to act—by what authority did you take possession of this stock of goods?

(Objection by defendant as immaterial & contradicts a written instrument. Overruled & exceptions by the defendant.)

A. Well, I think I was authorized when I was handed this paper.

Q. Was by virtue of this assignment?

A. Yes, sir.

Q. Had Lane any other stock — goods, to your knowledge, besides this at that time?

A. No, sir.

Q. Where was that stock?

53 A. At New Albin, Iowa, in a building owned by Mr. Lane. I took possession of the building at the same time I did the goods.

Cross-examination:

Q. Mr. Bock, you have been in the employ of Mr. Lane & in charge of the stock of goods from the April previous?

A. Yes, sir; down to the 20th of Nov., when we went to Lansing.

Q. What time did you leave New Albin to go to Lansing.

A. Between 9 & 10 o'clock in the morning. Mr. Lane went with me. When we got to Lansing we went to Mr. Kinne's office.

Q. This instrument that you spoke about, this assignment, was that all ready when you got there or did you stay there while they were writing it?

54 A. I was there part of the time.

Q. Did they make out the schedule at the same time, while you were there?

A. Yes, sir; I think they made out the schedule at the time.

Q. In the morning?

A. No.

Q. All the same day?

A. Yes, sir; I think we made them all out in one day, before nine o'clock in the morning.

Q. Look at the length of the inventory, what do you say; did you make it out that morning?

A. Well, I think we commenced the evening before.

Q. Whose handwriting is this schedule in?

A. In mine.

Q. Was Mr. Lane with you that day or the day before the 19th?

A. Yes, sir; he helped me make out these schedules.

55 Q. Do you recollect what time you got down to Lansing?

A. I think it was ten in the morning. We went by rail, and staid in Lansing while this instrument was being drawn. A part of it was drawn while I was in the office.

Q. At half past ten this instrument was handed to you and you took a team & drove to Waukon.

A. Yes, sir. Mr. Lane & I went together, and I don't now recollect the time when we got there.

Q. You had a key to this store before this?

A. Yes, sir; one key. The assignment was sent to me from Waukon by mail, I think, the second day afterwards.

56 The plaintiff here offers in evidence the assignment in question now before court.

The defendant objects to its introduction, because it is immaterial, incompetent, irrelevant, and does not convey the goods in question. Objections overruled and defendants except to the ruling.

Here the plaintiff reads the assignment in question to the jury, which is in words & figures following:

57 *General Assignment.*

This indenture, made the 20th day November, A. D. 1884, between Henry P. Lane, of New Albin, Allamakee county, and State of Iowa, of the — part, and Wm. O. Brock, of said county and State, of the second part:

Whereas the said Henry P. Lane is justly indebted in considerable sums of money and has become unable to pay the same with punctuality or in full and is now desirous of making a fair and equitable distribution of his property among all his creditors, now this indenture witnesseth: That the said party of the first part, in consideration of the premises and of the sum — one dollar to him paid by the party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold, and assigned, and does hereby grant, conv*a*y, and assign, unto the said party of the second part and to his assigns forever all the lands and all the personal property of every name and nature whatsoever of the said

58 party of the first part, more particularly enumerated and described in the schedule hereto annexed, marked Schedule "A," or intended so to be, upon the following trusts, viz: To take possession of said lands and personal property and sell said lands, unless otherwise directed by the circuit court of Allamakee county, State of Iowa, on notice published as in case of sales of real estate on execution, and dispose of said personal property upon such terms as in

his judgment may appear best, but not on credit, and hold the proceeds of sales of all of said lands and personal property for distribution among all the creditors of said party of the first part, in accordance to such orders and directions as may from time to time be made by said circuit court, and shall, after final settlement and distribution be made and all the reasonable expenses, rents, taxes, assessments, commissions, and allowances are paid, return any surplus there may be of the proceeds of the sales of the assigned
59 property to the party of the first part or his assigns; and also to reconvey, reassign, to him or them any real or personal property remaining unsold. Schedule B, hereto annexed, contains, as near as I can state, a list of all my creditor- and the amount of their respective demands, and both of said schedules, A & B, are hereby made part of this assignment.

Witness my hand the day and year first above written.

HENRY P. LANE.

In presence of—
SAM'L H. KINNE.

STATE OF IOWA, } ss:
Allamakee County, }

On this 20th day of November, A. D. 1884, before me, Sam'l H. Kinne, a notary public in and for said county, personally appeared Henry P. Lane, to me personally known to be the identical person whose name is affixed to the above instrument of assignment as grantor, and acknowledge- the execution of the same to be his voluntary act and deed for the purposes therein mentioned.

[SEAL.] Witness my hand and notarial seal the date last above written.

SAM'L H. KINNE,
Notery Public.

60 I hereby accept the trusts reposed in me by the above assignment and agree to execute the same.

Dated this 20th day of November, 1884.

WM. O. BOCK.

In presence of—
SAM'L H. KINNE.

SCHEDULE "A," Refer-ed to in the Annexed Assignment, Containing an Inventory of the Estate, Real and Personal, of Henry P. Lane.

Real Estate.

Lots 1, 3, 4, 6, 7, 11, sect. 19, t'w'p 100, R. 3.
" 1, 7, sect. 30, t'w'p 100, R. 3.
S. W. ¼ of N. W. ¼ sect. 19, t'w'p 100, R. 3.
20 feet off N. W. end lot No. 163, village of New Albin, Ia.; lot 124, village of New Albin, Ia.; 1 set hay scales.

61 *Personal Property.*

P. C. Grace 20 49
Chas. Little 4 20

Here follow 150 other names of persons indebted to the assignor in the schedule attached.

STATE OF IOWA, } ss:
Dubuque Co., }

I, Henry P. Lane, of said county, being duly sworn, depose & say that the foregoing inventory contains, according to the best of my knowledge, a true statement and account of my estate, both real and personal.

HENRY P. LANE.

Subscribed & sworn to before me this 20th day of November, 1884, by Henry P. Lane.
Witness my hand and seal.
[SEAL.]

SAM'L H. KINNE,
Notary Public.

62 SCHEDULE B, Referred to in Annexed Assignment.

List of Creditors.

G. S. C. Scott 142 28
Chamberlain & Co. 68 25

Here follow fifty other names of persons & firms scheduled as creditors of the assignor in the schedule attached, among which are—
C. P. Kellogg & Co.
M. D. Wells & Co.
H. W. King & Co.

63 STATE OF IOWA, } ss:
Allamakee Co., }

I, Henry P. Lane, of said county, being duly sworn, depose
64 and say that the foregoing Schedule "B" contains a true list of all my creditors & the amount of their respective demands.

HENRY P. LANE.

Subscribed and sworn to before me & in my presence the 20th day of November, 1884, by Henry P. Lane.
Witness my hand & seal.
[SEAL.]

SAM'L H. KINNE,
Notary Public.

65 On the back of said assignment was the following:

"*Assignment for Benefit of Creditors.*

Henry P. Lane to Wm. O. Bock."

STATE OF IOWA, }
Allamakee Co. }

Filed for record the 20th day of November, 1884, at 4.10 o'clock p. m., and recorded in Book "K," on pages 504 to 510, inc., of chattel mortgage records.

J. D. BRENNAN, *Recorder*,
By E. D. PURDY, *Deputy*.

66 W. H. THRIFT, a witness sworn in behalf of the plaintiff:

Q. Were you a deputy of Mr. Perkins during the time that he was United States marshall of this northern district?

A. Yes, sir.

Q. Was Mr. Hopkins engaged as his special deputy during that time?

A. Yes, sir.

Q. Do you recollect of Mr. Hopkins going up to Allamakee Co. & serving attachments against the goods and property of Lane, of New Albin, in November, 1884?

Objection by defendant- as incompetent. Overruled and exceptions by def't-.

A. Yes, sir.

Q. Mr. Thrift, did you, as deputy of Perkins, afterwards demand from the plaintiffs, Kellogg, King & Wells, or either of them
67 indemnity bonds for taking possession of these goods?

Objection by counsel for defendant-.

Counsel for plaintiff offers in evidence the notice served on the defendants by W. O. Bock, the assignee, claiming the immediate possession of the goods in question taken by virtue of the writs of attachment.

Defendants object to the introduction of the notice in evidence—

1st. Because it purports to have been given long after the transaction to which they have testified and long after the indemnity to which they have alluded to in their testimony. It was not given until Dec. 17, 1884.

68 2nd. Because it recites certain facts with regard to this attachment where there is no evidence of this attachment, and this is not proper or competent evidence of this attachment.

3d. We object, so far as it purports to have been served on G. D. Perkins and the service and acceptance of Thrift, who was his deputy, who was in possession of the goods, & he had no connection whatever with them, and that it is immaterial, irrelevant, & incompetent and has no connection under that notice of this matter under the statute.

Objection overruled, defendant- taking exceptions.

The notice was read in evidence, being in words & figures following:

69 To Geo. D. Perkins, W. H. Thrift, and Tim. M. Hopkins:

You will please take notice that the undersigned, assignee of H. P. Lane, claims of you the immediate possession of the stock of goods taken by you from his possession under three certain writs of attachment issued — of the circuit court of the United States, northern district, eastern division, of Iowa, in favor of C. P. Kellogg & Co. *vs.* H. P. Lane, M. D. Wells & Co. *vs.* H. P. Lane, and H. W. King & Co. *vs.* H. P. Lane. Said property belongs to the undersigned, and was held and possessed by him by virtue of a general assignment executed by H. P. Lane to the undersigned, under the laws of Iowa, for the benefit of the creditors of said H. P. Lane, said assignment having been accepted by the undersigned and he having entered at the time of such seizure upon the discharge of his duties as such assignee.

Dubuque, Dec. 17th, 1884.

WM. O. BOCK,
Assignee of H. P. Lane,
By FOUKE & LYON,
His Att'ys.

70 STATE OF IOWA, } ss:
Dubuque Co., }

D. E. Lyon, being duly sworn, says that he is one of the attorneys of W. O. Bock, the claimant in the above notice; that he has knowledge of the facts stated in said notice, and that the matters and things therein stated are true, as he verily believes.

D. E. LYON.

Signed & sworn to before me by D. E. Lyon, the affiant, this 17 day of December, A. D. 1884.

Witness my hand & seal.

H. B. FOUKE,
Notery Public of Iowa.

We hereby accept service of the within notice, at Dubuque, in the northern division, eastern district, of Iowa, this 17th day of December, A. D. 1884.

GEO. D. PERKINS,
U. S. Marshall,
By W. H. THRIFT,
His Agent.
W. H. THRIFT.
T. M. HOPKINS.

71 N. H. RANSOM, a witness for the plaintiff, being sworn, testified as follows:

My name is N. H. Ransom. I live at New Albin, Iowa. In No-

vember, 1884, I was a clerk in Mr. Lane's store, and was so employed when he assigned to Mr. W. O. Bock.

Q. Do you know what goods were there in the store at the time that Mr. Hopkins came up there?

A. Yes, sir.

Q. What was the value of the stock of goods at the time that Mr. Hopkins took possession of them?

Def't- objects as incompetent & immaterial, time being prior to the giving of the notice. Overruled & exceptions by defendant-.

Q. You assisted in taking the inventory of the goods?

72 A. Yes, sir; and I knew the amount of goods that were in the store at the time Hopkins took possession.

Q. What was the value of the stock of goods that were in the store at the time he took possession?

Same objection as last above by def't- & same ruling.

A. I should judge there was between 8,500 & 9,000 dollars.

Q. Was that the fair market value of them at New Albin?

A. Yes, sir.

Cross-examination:

Q. Do you know what Mr. Hopkins did with the goods?

A. Yes, sir; he was there on the 26 Nov. He did not take the goods away from New Albin till about two or three weeks.

73 He boxed them immediately up & took them to depot & then took them to Dubuque.

Q. Each lot was taken up by itself & taken to the depot?

A. Not exactly that way. First, we would have one attachment, & then we would box up the goods, & while part of us were taking one lot of goods & packing them up & taking them out of the store, and as fast as we got them packed up & then mark them, then we would get to work at another one & mark that; we would take all out & separate them & then mark them & take them to the depot. It was about three or four days before the goods were all packed and taken to the depot.

Redirect:

74 Q. Were you present when anything was said between Mr. Hopkins & Mr. Bock as to Mr. Bock's assistin- Mr. Hopkins?

A. Yes, sir.

Q. Will you state what it was, please?

Objection by def't as immaterial. Overruled.

A. Mr. Hopkins asked him to assist him in boxing up the goods. Bock objected on the ground that he was assignee & he didn't care to have anything to do with the goods and it wouldn't look right. Mr. Hopkins said it was all right if he could earn a dollar or two, & taking that view of it, he assisted him.

Def't moves to strike — latter part of the answer.

Q. Mr. Bock assisted him?

A. Yes, sir; I know he did from my own knowledge, and Mr. Hopkins offered to pay him.

75 Q. Do you know how many attachments he claimed to have when he came up there?

A. He had two attachments.

Q. Was there any other attachments brought up?

A. Yes, sir.

Q. Did Mr. Thrift come up?

A. Yes, sir.

Q. Before Mr. Thrift came up what did Mr. Hopkins do with reference to these goods?

A. He nearly finished the two attachments. We were there taking stock.

Q. Well, what happened when Mr. Thrift came?

A. Well, they finished the whole stock. Thrift served another attachment when he got there.

Recross-examination:

Q. How about this attachment? You said Mr. Hopkins came up there on the 26th?

76 A. Yes, sir. About 4 or 5 o'clock p. m. he was in the store.

Q. What was he doing with the goods?

A. He wasn't doing anything. He just informed Mr. Bock that he was there to take the goods, & Bock came & spoke to me about it. He wanted to know what he had better do. That was the first time I saw him.

Q. Then Mr. Hopkins said he wanted to take out goods and box them up—enough to satisfy the judgment?

A. Yes, sir; and he went right at doing that—boxing them up; and as soon as that was done he went at the other attachment in the same way.

Q. Do you know the value of the goods he took on the first attachment?

77 A. No sir. You can't state the value of the goods taken on the second attachment. He did not take the whole of the 8,000 dollars upon either one of them.

Redirect examination again:

Q. Did Mr. Hopkins, to your knowledge, deliver back to Mr. Bock any portion of this stock of goods?

A. That 15 or 20 dollars' worth of perishable goods were left. I don't know whether they were delivered back or not.

W. O. Bock recalled by counsel for plaintiff:

When Mr. Hopkins came there I stated to him the manner in which I came in possession of this property. I showed him the papers of assignment & told him that the goods belonged to

78 me as assignee. He looked at the assignment & said it was perfectly satisfactory; that I was the assignee.

Q. You were asked whether you assisted in packing up the goods?
A. Yes, sir.
Q. State to the jury how you came to assist, what was said to you & what was said in reply.

By the COURT: I shall instruct on that point, so I don't see that there is necessity to ask that.

Q. Now, what, if any, goods were returned to you by Mr. Hopkins or Mr. Thrift?
A. There was not any goods returned to me whatever. The goods they left was ¼ barrel coal oil that I would not give a cent for.

79 Q. Do you know how Mr. Hopkins arrived at the value set opposite the articles?
A. He guessed at it.

Cross-examination by defendant-:

The first day Mr. Hopkins—he laid hands on all the goods in the store.
Q. Went around and touched them piece by piece?
A. No, sir.
Q. What did he do on the first day?
A. He served the attachment on the stock. He did not pack the first day; he served the notice, and the next day he went taking out goods on one attachment; after he got through with one he went at the second attachment. I don't know the value of either attachment. On the first day he came up he took possession of the store.

80 T. M. HOPKINS, a witness sworn for the plaintiff, testified as follows:

I was a special deputy marshall on the 25th of Nov., 1884. Mr. Thrift was my principal.
Q. Who was the principal marshall?
A. G. D. Perkins, one of the defendants in this case.
Q. I will ask you if you received for execution that writ of attachment dated the 25th of November.
A. Yes, sir; Kellogg, & this one, M. D. Wells & Co., second.
Q. I'll ask you if what you did at New Albin on the 26th November was done by virtue of these writs.

Def'ts object unless writs are offered in evidence. Overruled & exceptions by defendant-.

81 Q. You did what you did to this stock of goods by virtue of these suits?
A. Yes, sir.

Cross-examination by counsel for def't-:

On these two writs I took the goods separably; on the Kellogg writ first—C. P. Kellogg & Co.

Plaintiff here introduces in evidence the writs of attachment, to which reference has been made, in favor of C. P. Kellogg & Co. *vs.*

H. P. Lane & M. D. Wells & Co. *vs.* H. P. Lane, which are hereto set out in words & figures following:

Instead of setting them out, it is admitted that the writ of at-
82 tachment in favor of Kellogg & Co. introduced in evidence is a writ of attachment, all in due form, issued out of the circuit court of the United States for the northern district of Iowa on the 25th of November, 1884, in favor of C. P. Kellogg & Co. *et als.* against H. P. Lane, commanding the attachment by the marshall of sufficient property to satisfy the sum of $773.50, with interest and costs.

That the writ of attachment in favor of Wells & Co. introduced in evidence is a writ of attachment, all in due form, issued out of the circuit court of the United States for the northern district of Iowa on the 25th of November, 1884, in favor of M. D. Wells & Co. against H. P. Lane, commanding the attachment by the marshall of sufficient property to satisfy the sum of $1,338.92, with interest and costs.

83 Be it further remembered that the plaintiff upon said trial and at the times of the several rulings made by said court upon objections to the admis-ability of evidence, as hereinbefore noted and set forth, duly excepted thereto and prayed a bill of exceptions thereon, it being ordered by the court that all the exceptions thus taken should be included in & form part of the general bill of exceptions signed at the conclusion of said trial.

Be it further remembered that, the plaintiff having rested his case, thereupon the defendants, to support the issues on their behalf, introduced in evidence the following evidence & testimony.

84 Here the plaintiff rested his case.

The defendants, to maintain the issues on their part, produced and had sworn T. M. HOPKINS, who testified as follows:

Went up to New Albin on the 26th with the writs and took out what I thought was the amount of the Kellogg & Co. claim and fifty per cent. more & boxed them up.

I then did the same with the Wells & Co. writ & kept them separate until I got ready to box, and then boxed them as fast as could get boxes.

85 Then after that I assisted Thrift in taking another batch of goods. Thrift didn't have anything to do with these goods that I took under the two writs.

Q. What did Mr. Thrift have to do with boxing of these goods?

A. Didn't have anything to do with them.

Q. What did you do about taking possession of the entire stock of goods, before Thrift came up there, under these writs?

A. It was nearly dark when I got up there—between 4 & 5 o'clock. I- was some time before I made my business known; told Bock what my business was & had shown him my writs. He showed me his authority as assignee. That was the first work we did. We concluded to take the amount in the morning; it was very
86 cold that night and we waited till morning; so I had to have some one hold possession over that store in order to

make my writs good. I don't know whether I took both keys; my impression is Ransom had one that night or he had one next morning. I got him to assist me in taking stock. We went at it next morning.

Q. Who did they put in?

A. I think Mr. Ransom. I got them to take stock. Ransom was a clerk in the store.

Q. As you took the goods & boxed them did you do anything about taking the value of them?

A. Yes, sir.

Q. Is this the list or valuation shown here?

A. Yes; here it is. I made the list in the store at New
87 Albin, and the book on which the list is, I bought it at a book store.

Q. How did you make the figures in the book?

A. With the assistance of Bock & Ransom; they had the cost-marks. Once in a while there would be a little thing that I thought was too high. I told them I just wanted enough to cover the writs & 50% added. They put in everything at their own cost-marks, of course. We didn't measure everything we put in of all kinds. They told me how many yards & about how many pounds in the grocery department, & we put down & figured it up. These are the same goods that were afterwards appraised by Mr. Gilliam & Wales at Dubuque.

Cross-examination by counsel for plaintiff:

88 When I got to New Albin Bock had possession of the goods. I showed him my writs & he showed me the assignment. He claimed to be in possession as the assignee of H. P. Lane.

Q. Well, before you took any goods you knew he claimed to be in possession of them as assignee?

Def't- objects, as it calls for a conclusion. Overruled & exception by def't-.

A. Yes, sir.

Q. Don't you know as a matter of fact that you took possession of both keys the first thing when you were there?

A. Well, sir, I don't know whether I did or not.

Q. You intended to have control over the store that night?

89 A. I intended to secure enough to make a levy on of the stock.

Q. Did you deliver back to Mr. Bock any portion of these goods that were in the store upon the night you took possession?

A. I delivered back the key of the store with the goods in it.

Q. Answer my question.

A. None that I took. I gave him the key to the store when I got through.

Q. Was it after the goods were shipped?

A. I don't think they were all out. I assisted in packing up the other goods besides those that were included in these writs.

Q. How did you undertake to take them?

A. I was assisting Mr. Thrift. He had another writ.
Q. You took substantially all there was in the store?
A. Yes, sir.

90 Re-examination by the defendant-:

No such notice as that of Dec. 17, 1884, was served on me while I was at New Albin (meaning the notice of being the owner of the goods by Bock, assignee).

H. P. LANE, called as a witness by the defendant-:

Q When you went from Lansing to Waukon with Mr. Bock you took down & filed for record a deed from H. P. Lane to Anna P. Lane?

A. Yes, sir; also a mortgage from H. P. Lane & Anna Lane to H. Hostet & others. Anna Lane is my wife. I had previous
91 to this time been indebted to her, and these deeds were in consideration of my debts.

Defendants offers in evidence certified copies of deed, H. P. Lane to Anna Lane, filed 20th Nov., 1884, at half past 3 p. m.; and also offers in evidence certified copies of mortgage, H. P. Lane & Anna Lane to H. Hostet *et al.*, marked Ex. B; to both of which offers p't'ff objects because not competent; no objection that they are not the best evidence. Overruled & exceptions by plaintiff.

I had possession of these two instruments at the time they were executed, up to the time that they were recorded.

Q. Did you, on the 18th of Nov., 1884, execute the assignment to Frank Hartley of a certain mortgage held by Richard
92 Morgan?

A. I don't remember the day. I executed such an assignment and delivered it to Hartley. I did not deliver him the mortgage at the same time. I have not the mortgage in my possession. The consideration of that was my indebtedness to Hartley.

It is admitted that the deed from H. P. Lane to Anna Lane which the defendant- offers in evidence was made & executed and acknowledged on the 18th day of November, 1884, which was a full covenant deed, but subject to a mortgage, executed, made, and acknowledged the same day, for the sum of 2,500 dollars, in favor — Herman, Lizzie, Henry, and Kate Hostet, minor heirs of M. Hostet, deceased, and which said mortgage the grantee in the deed, Anna Lane, agreed to pay (*i. e.*, the deed so recites, though signed by H. P. Lane only), and which was made a part consideration for said deed. The deed conveyed about 800 acres of land in Allamakee county, Iowa, and three lots in New Albin, Iowa, & was properly recorded among the records of Allamakee Co., Iowa, on the 20th day of November, 1884.

93 It is further admitted that the mortgage from H. P. Lane and Anna, his wife, to Herman, Lizzie, Henry, and Kate Hostet was made, executed, & acknowledged on the 18th day of November, 1884, for the consideration expressed of 2,500 dollars, and the same land is embraced in said mortgage as is conveyed by

H. P. Lane to Anna Lane, his wife, on the same day, subject to said mortgage; that said mortgage was properly recorded among the records of Allamakee Co., Iowa, on the 20th day of November, 1884.

It is further admitted that mortgage made April 30, 1884, was a mortgage made & executed by Bridget & Patrick Morgan to
94 H. P. Lane on 120 acres of land in Allamakee Co., Iowa, and was properly recorded among the records of said Co., being recorded May 3, 1884; and that on the 18th day of November, 1884, said H. P. Lane sold & assigned the same to Frank Hartley, which said assignment of said mortgage was properly recorded among the records of Allamakee Co. Dec. 2, 1884.

95 Counsel for def't- offers the certified copies of the assignment & mortgage in evidence. Plaintiff objects because they are not competent. (No objection that they are not the best evidence.) Overruled and exceptions.

Q. Mr. Lane, Herman, Lizzie, and Kate Hostet were minor heirs?

A. Yes, sir.

Q. About this time you turned over securities to Mr. Anderson?

A. Yes, sir; he was a creditor of mine at the time of the
96 assignment & before. I don't recollect the day of the month I turned out the securities to him, but I think I made a payment on the 12th or 13th of the month.

Q. Didn't you turn out certain notes as collateral?

A. I believe I did, but I don't think as late as the 18th or 19th of Nov. I also turned over certain securities to Large & Arnsden, of Dubuque. I can't tell at what time, but I don't think as late as the 18th or 19th.

Q. Did you, on the 19 Nov., turn out a quantity of notes, amounting to 1,497 dollars, to Moses Anderson?

A. No, sir; I turned him over about 1,000 dollars—somewhere near that. I have always done that way. I owed him at
97 that time 2,000 dollars. I think it was in the month of November, but before the 19th, that I did what I did in regard to securing Moses Anderson.

Q. What was your condition during the month of Nov., as to your ability to pay your merchandise debts as they became due?

A. Bad condition. I was not able to pay these debts as they became due. I had been sued by Carson, Pirie, Scott & Co. for a bill of merchandise.

I can't say the date that I gave collaterals to Large & Arnsden, but I think it was before Nov. 19th. I gave security to Miles Nilder, of Lansing, in Nov. I think I turned out securities to Mehlhop a few days before I did to Large & Arnsden.

Q. If understand you, you gave security to Anderson, Mehlhop, & Large all within a few days of each other?

98 A. Yes, sir.

Q. And at that time you were not able to pay your merchandise debts?

A. I was paying them that way, but not in money, as I was not able to pay them in money.

After seeing a letter of mine I say now that I gave security to Mr. Large & Arnsden Nov. 19th.

Cross-examination:

These minor heirs spoken of in these deeds are my wards. I was their guardian. I was responsible to them for their money I had received as their guardian.

I was indebted to my wife between 3 & 4 thousand dollars.

I made a conveyance to my wife.

99 On the 13th day of Nov., 1884, my wife came down with the original notice Carson, Pirie, Scott & Co. served; it was served on the 13th; she came & presented me with that notice & petition & said I want you to secure me for what you are oweing me. Won't they come & take that farm? Won't they come in ahead of me? I said, Yes. Well you have got to secure me on that farm, there was a mortgage on that farm of 5,000 dollars.

Q. Was that a fact?

A. Yes; that is a fact.

Q. Did you say anything to your wife about your indebtedness to these children?

A. Yes, sir.

Q. Now, then, at the time you executed these deeds or mortgages did you have any intention of making a general assignment of your property?

100 Def't- objects as incompetent. Overruled & exceptions by def't-.

A. No, sir; I first thought of it on the 19th of November, about noon.

Q. When did you write this letter to Mr. Large?

A. The night before.

Q. The letter says, "Enclosed find note of W. Young for 69.54 dollars. When collected, credit my account"?

A. Yes, sir; I sent the note & letter in response to a statement.

Q. How did you come to turn over to Moses Anderson as collateral that day?

A. I had been doing that all summer; it was in response to a statement I turned over to Mehlhop & Co. in the same way.

Q. Did you have a large amount of accounts & notes in
101 your possession at the time?

A. No, sir; I sent them out as fast as I collected them, and as fast as I got them in I sent them out. I gave instructions to Bock to do that. As fast as I got some negotiable paper I sent it off on some debt.

Q. Now, what property at the time you made the assignment did you have that was not incumbered, if any?

A. I had a store & real estate that I turned over to the assignee.

Q. Did you have any other property?

A. Not any. I had book accounts. The property that I turned over to my assignee was not incumbered.

Q. Do you know how much you owed at that time?

A. No, sir.

102 Q. I will ask you if, at the time you turned over these notes to Mehlhop, Large & Anderson, you had in contemplation of making a general assignment to your creditors?

Def'ts object as leading & incompetent. Overruled. Exceptions by def't.

A. No, sir.

Q. Did you, at the time you made these collateral payments or sent these notes, intend to prefer these creditors in contemplation of afterwards making a general assignment for the benefit of your other creditors?

(Same objection & ruling as last above.)

A. No, sir.

Q. I will ask you if, at the time you executed these mortgages & deeds to your wife & these children, you had in contemplation a general *a general* assignment of your property to your creditors?

103

(Same obj. & ruling.)

A. I did not.

Q. These mortgages were made by H. & P. Morgan, for 450 dollars, to Frank Hartly. Were you indebted to them?

A. Yes, sir; I had signed the note to them May 1, 1884. The purpose of assigning the mortgage to them at that time was to get my own note up, that he held as collateral, that was due.

Q. He held this as collateral on your note?

A. Yes; the day of the assignment he gave it up.

Q. He gave up the note, took the assignment, & released you from your obligation?

A. Yes, sir.

104 Q. How does it come that you carried this deed & mortgage of your wife's to the recorder's; couldn't she record it?

A. The reason was my wife gave it to me to be recorded. I was the proper party to carry it there.

Q. Was the recording of this deed or mortgage any part of the transaction of the execution & recording of your assignment, so far as your interests was concerned?

(Same objection & ruling as last above.)

A. No, sir; had nothing to do with it.

Q. Had not been?

A. No, sir.

Redirect examination:

When I took these deeds and rode over in the same conveyance with Mr. Bock I knew he had in his possession this assign-
105 ment to be recorded. I was well aware he had it in his pocket.

Recross-examination:

I delivered these deeds to my wife the 19th of November, in the morning, and she gave them to me to take to the recorder's office the same day.

Redirect examination again:

Q. You say you thought of the assignment before the 19?

A. Yes, sir; partially on a contingency. I first thought of an assignment on the morning of the 18th. This was the day I first gave it thought, and this was also before the execution of
106 the conveyance to my wife and the mortgage to the Hostet heirs. I did not talk of making an assignment on the 17 of November. I remember of seeing Mr. Hurd up there on the 17th.

Q. You talked with him about an assignment?

A. Not on the 17th; it was on the 18th.

Q. Didn't you tell him you would make an assignment?

A. I counc*i*lled with him as to the effect of making an assignment and the effect, & suggested Mr. Bock as assignee.

Q. Didn't you tell him you would make an assignment?

A. I told him I possibly might.

Q. I will ask you to look at that letter. Did you write it yourself?

A. Yes, sir.

107 Q. What have you to say about having told Mr. Hurd about making an assignment?

A. Just the same as before. I told him I would make an assignment on certain contingencies, and I told him that I would wait until I heard from Carson, Pirie, Scott & Co., & if I didn't hear from them I would talk the matter over, & if I concluded to make an assignment I would write & let them know.

Q. You mean by that you wrote him in advance of it?

A. Yes, sir.

L. G. HURD, a witness for the defendant-, sworn & examined:

108 I was at New Albin the day before this assignment. I arrived there Nov. 17th & left there the 18th. I had a conversation with Mr. Lane about assignment.

Q. When did you have it?

A. Can't tell positively. It might have been on the 17th or 18th. There was some talk between us on the subject of assignment.

Q. What, if anything, did he say about making an assignment?

A. He talked about it at length. He said he had been thinking of making the assignment & would make it to Mr. Bock, and in that conversation we referred to what business he had. He had not been selling as many goods as before. He told me that a year before he was selling about 100 dollars a day, & and that he wasn't
109 selling anywhere near that now, & among other things was that he was thoroughly discouraged in regard to his business and can't continue in this way any longer. I talked with him quite a little after he broached the subject of an assignment. He asked

me whether a statement of his intention of making an assignment would not be grounds for an attachment for some of the creditors; said he had been making an effort to have some understanding with his creditors by correspondence. He said the largest of them didn't all live in the same town; that some lived in Chicago & some in La Crosse; said his indebtedness amounted to about $8.000; that he had his stock there and about $3,500 standing out;
110 that he had some real estate, more or less incumbered. Often I told him that if he would not be able to pay his debts that the proper thing for him to do would be to make an assignment, in my judgment, and had told him that an intention of that kind would not justify an attachment. I was there as an attorney for a creditor and told him so. I tried to get him to give me security, & he said he would not secure any creditor, either old or new; that he felt as friendly towards one as the other, and he didn't think it was the best way, to give security to anybody; that if he had to go that they should all fare alike. The talk we had with reference to making an assignment followed that talk. He mentioned Carson,
111 Piri, Scott & Co.; said he had written them & other Chicago creditors & that he was waiting to hear from them.

Cross-examination:

Q. Mr. Hurd, you are one of the att'ys of this suit?

A. The record shows. I expect if Henderson, Hurd & Daniels are handed any fees in the office out of this case I expect to participate in them. I have taken no part in the management of this case.

WM. H. BOCK recalled by the defendant-:

Q. Did you see this notice, as served on the 17th of Dec., 1884, & offered in evidence, before?

Plaintiff objects as incompetent.

112 It is admitted that there is no other written notice claiming the goods than the one of Dec. 17, 1884.

T. M. HOPKINS recalled by the defendant-:

Q. I ask you to state in detail what was done in taking possession of the goods the first day you got up there.

Ans. I got there after dark & I made my business known to that gentleman there. We talked the matter over. It was a very cold night, and we thought we couldn't work to any advantage, but would commence early in the morning. I saw a large crack in the stove & I said to them that it looks a little careless to leave it in that way, so we fixed the stove, and I would have to put
113 a man in there; so I took possession of the keys. They handed them over to me & the next morning we went to work, and I hired Mr. Bock & Mr. Ransom & another man, named Joe. I had the conversations the night before with Bock. The balance of the goods I had not taken on these two writs were taken by Mr. Thrift. He came with a writ & took them just about the time that I got

through with the two writs before that that I had, & had the goods boxed up.

The witness is here shown a book & is asked what that book is. Witness says it is a copy of the book made in New Albin.

I don't know what has become of the book made in New Albin. I have made search for it since yesterday & have failed to
114 find it. I am satisfied it is not in the office below. My son made the copy. I called off the articles to him from the appraiser's book.

Q. In regard to the goods that Thrift got in New Albin, did you make a list of those?

A. Don't remember whether I did or not; think I did—a part of them. They must have changed them around some here, though. I think Thrift made the list. The book contains a list of the whole thing. The goods were kept separate on the book by marks on it.

Q. Were these goods examined by anybody here for the purpose of appraising them?

A. Yes; by Gilliam, Kopp, and Wales. The goods they examined here are the same goods that were taken on the writs of attachment at New Albin.

115 It is admitted that there are three lists or inventories of goods entered in the same blank book and carrying out against each item of goods the figure representing its inventory valuation. The first list is entered Chas. P. Kellogg & Co. *et al. vs.* H. P. Lane and concludes with the total of the figures $1,509.07 and the appraisal "50 % on the above." Signed by C. E. Wales, A. Kopp, & T. F. Gilliam. The second list is entered M. D. Wells & Co. *vs.* H. P. Lane and concludes with the total of the figures $2,655.57 and the appraisal "42½ % on the dollar on the above figures," & signed by same persons. The third list is entered Henry W. King & Co. *v.* H. P. Lane & concludes with the total of the figures $2,155.39 and the appraisal "45 % on the dollar on the above figures." Signed by the same three persons.

116 Cross-examination by plaintiff:

I staid at New Albin until all the goods were disposed of. Mr. Thrift & I came away, I think, at same time. When he came up I assisted him in taking care of his part of the goods on the King & Co. execution. There were no measurements of the goods taken at the time of the appraisements.

Redirect:

I did nothing at all about levying the writ that Mr. Thrift had when he came up there.

Recross-examination:

After he did levy we went on and packed up the goods
117 that he claimed to levy on just the same as the others were packed.

Redirect again:

Mr. Bock helped about the packing.

Recross again:

There was no formal turning over by me to Mr. Thrift of any of the property there.

L. G. HURD, recalled by defendant-:

Q. Were you one of the att'ys for Wells & Co. & C. P. Kellogg & Co. at the time of issuing the writs of attachment?

A. I was one of the att'ys. I saw Hopkins before he went to New Albin.

Q. What directions did you give him as to what goods he should levy on?

118 A. I told him to levy on the goods he found in the store, that would probably be in the possession of Mr. Bock, first one writ & then the other. He had two writs.

Cross-examination:

Q. Did your principals afterwards execute an indemnity bond to the marshall of this district?

(Objection by def't- as incompetent & immaterial. Overruled & exceptions.)

A. Of my own personal knowledge I can't say. I think they did, though I don't know that I ever saw the bond.

Defendant then called C. E. WALES, T. F. GILLIAM, and A. KOPP, and each testified for defendants as follows:

119 I am acquainted with the value of stocks of *of* merchandise. I was one of three appraisers, viz.. C. E. Wales, T. F. Gilliam, & A. Kopp, who examined & appraised the goods in question in Dubuque. We had the book containing the lists or inventories referred to by Mr. Hopkins, & which footed up as follows: Kellogg inventory, $1,509.07; Wells inventory, $2,655.57; King inventory, $2,155.39.

We appraised the goods as follows: Kellogg stock, at 50% of inventory—that is, 50% of $1,509.07; Wells stock, at 42½% of inventory—that is, 42½% of $2,655.57; King stock, at 45% of inventory—that is, 45% of $2,155.39, and we noted said appraisal at the foot of the lists in the book & signed same as they now appear.

120 W. H. THRIFT, called by defendant, testified as follows:

All the goods taken at New Albin had been brought to Dubuque and were in Dubuque on December 17, 1884, at the time of the service of the notice served that day.

Here the defendant- rested *his* case.

121 Be it further remembered that the defendant-, upon said trial and at the times of the several rulings made by said

court upon objections to the admissibility of evidence, as hereinbefore stated & set forth, duly excepted thereto and prayed a bill of exceptions thereon, it being ordered by the court that all the exceptions thus taken should be included in & form part of the general bill of exceptions signed at the conclusion of said trial.

Be it further remembered that the defendants having rested their cause, thereupon the plaintiff in rebuttal introduced the following testimony:

122 The plaintiff in rebuttal then called W. O. Bock.

I first learned *that* Mr. Lane's intention of making an assignment on the 19th of November between 9 & 10 o'clock in the morning. On that day Mr. Lane went from New Albin to Lansing, & while he was gone I was engaged in making this inventory, &c.,
123 scheduling; was engaged so a part of the time that day. The rest of the inventory and schedule was made after Lane came home, in the evening of the 19th, between 9 & 12 o'clock.

I know Mr. Hurd was there. I believe he received some payment or collaterals for Wells & Co.

Cross-examination:

I think I saw the collateral given to Mr. Hurd. I think I handed it to him. I don't know what day it was, but I think on the morning he left. I recollect seeing Mr. Lane with Mr. Hurd. I don't recollect the day. Mr. Lane did not go — Lansing the day Mr. Hurd was there. Mr Lane lived 6 or 7 miles from New Albin; further from Lansing than New Albin.

124 H. P. Lane recalled by the plaintiff:

When Mr. Hurd was at New Albin he got from me, on claims of M. D. Wells & Co., a 200 note and ten dollars in money. After my interview with Mr. Hurd I went to Lansing same day, between 8 & 10 o'clock. My wife saw me at New Albin, on the 14th of November, in reference to my giving her that security.

Q. When did you first conclude to make an assignment?

A. On the morning of the 18th.

Q. What was the inducing cause?

Def't- objects as incompetent & immaterial. Overruled & exception by def't-.

125 A. I had a letter from a Chicago firm. It was when I got the letter from the Chicago firm that I made up my mind. The letter was from a creditor of mine.

Q. When did you determine to make a general assignment?

A. On the 19th of November, after 9 o'clock. I got the letter between 9 & 10 o'clock. I went to Lansing that day and consulted a lawyer. I went to Lansing again the next day. The assignment had been commenced to be drawn up when I got there & was finished after I got there.

Q. When was it that your wife demanded of you & you agreed to

make to her the conveyances that have been introduced in evidence here?

Def't- objects as incompetent, irrelevant, & immaterial. Overruled & exceptions.

Ans. On the morning of the 14th of November, 1884.

126 Cross-examination:

I *road* down to Lansing that day with a Boston man in a buggy. I left New Albin after dinner.

I was down there on the 18th also. I went there the day that Mr. Hurd was there at New Albin; went that morning, after having a talk over the matter.

Mrs. ANNA LANE, called by the plaintift, testified as follows:

I am the wife of H. P. Lane and I live in Iowa township, Allamakee Co., Iowa.

Q. In 1884 was your husband indebted to you for anything?

The defendants admit that *she* was, and that she demanded security on the 14th day of November, 1884.

127 Plaintiff rests his case, and here the testimony was ended.

Be it further remembered that the foregoing is all the evidence given, received, offered, or admitted on the trial of said cause; that the several objections recited & set forth were at the proper time & in proper form made by the parties hereto, and the rulings as above set forth were made by the court upon said objections, as hereinbefore stated & set forth, and exceptions in proper form were at the times said rulings were made duly prayed by said plaintiff, as hereinbefore stated, and allowed by said court and ordered to be incorporated in a single bill of exceptions, to be signed at the close of said trial.

128 Be it further remembered that, after the close of the evidence in said cause and after argument by counsel for plaintiff upon the law of the case, the court announced that it was useless to proceed to the jury in argument upon the facts, for the reason that, in the judgment of the court, the plaintiff had failed to make out his case, and that it was the duty of the court to instruct the jury to find for the defendants.

And thereupon the court instructed the jury as follows:

129 At the conclusion of testimony and arguments of council the judge instructed the jury as follows:

Par. 1. Gent-emen of the jury: It appears from the evidence in this case that on or about the 25th day of November, 1884, certain writs of attachment were issued out of this court in favor of M. D. Wells & Co. and against one H. P. Lane, living at New Albin, in this State.

At that time the defd. Geo. D. Perkins, was the marshall of this court, and the other defd. Thrift and Hopkins, were deputies. The writs of attachment were placed in the hands of the defendants in

their official capacity, and it became the duty of the defendants to levy their writs upon any property not exempt from execution belonging to the defendants in said writ, to wit, H. P. Lane, —— ——. T. M. Hopkins, acting as deputy marshall, went to New Albin for the purpose of levying these writs. It appears from the evidence that H. P. Lane had been carrying on a mercantile business at New Albin, buying and selling in the usual way of a country
130 store. When Hopkins went to the store of said Lane for the purpose of levying the writs of attachment he, W. O. Bock, the present plaintiff, — in possession of the goods in said store, claiming the right thereto as assignee of H. P. Lane, and, as evidence of this right to the possession of the goods in his cap-city as assignee, Bock exhibited to Hopkins the following instrument in writing. (The judge here read to the jury the assignment executed by H. P. Lane to Bock and dated 20th day of November, 1884.) Now, gentlemen, if that instrument had the effect of conveying the goods in question to Mr. Bock as assignee, then, unless it is void for other reasons, the plaintiff was rightfully in possession and the defd. Hopkins would, if he levied the writs of attachment thereon, do so at his peril.

If, however, the instrument in question did not include the goods in question and did not transfer the title thereof to the plaintiff, then the title of the goods still remained in *in* H. P. Lane, and the
131 defd. Hopkins was justified in levying the writs thereon and taking possession of — thereunder. Under the statutes of Iowa, as construed by the supreme court of the State, a debtor has the right and power to execute a partial assignment of his property for the benefit of creditors, or he may execute a general assignment for their benefit. If he proposes to make a general assignment, then he must assign all of his property not exempt from execution for the common benefit of all his creditors. If, however, he assigns only part of his property, then it will be only a partial assignment. As I construe this instrument executed by H. P. Lane, it amounts only to partial assignment. True, it is headed general assignment and there are recitals in it which would be entirely proper as forming part of general assignment, but when we come to the conveying part of the instrument we find it declaring that there is conveyed to Bock all of the property described in Schedule "A" attached
132 to the instrument, and in this schedule is not found any reference whatever to the stock of goods. It includes certain realty and a large number of notes and accounts, but does not include the stock of goods. It is not shown by the evidence that any other schedule was to be attached, or that Schedule "A," as it now appears, is imperfect.

In other words, the instrument, in the form it now has, is the instrument executed by H. P. Lane and under which the plaintiff claims the title and right to the goods in controvercy. Unless, as it now stands, it conveys the goods to the plaintiff, he has no title or right thereto and no interest therein, and consequently cannot maintain this action for their value against the defd., as I have already said. As I construe this instrument, it must be held to be a partial

assignment only, conveying the property set forth in Schedule "A."
It does not *not* therefore include the goods in question, and
133 the plaintiff therefore has failed to show title in the goods
and cannot maintain this action, and your verdict must be for def'd's.

If, however, I am wrong in this ruling and it should be held that this instrument does convey the title of the goods to the plaintiff, as assignee, or, in other words, if this instrument is to be held to be a general assignment, then another question would arise, and as it has been fully presented by the evidence I deem it my duty to rule thereon, in order that all the questions material to the parties may be presented to the appel-ate court.

Par. 2. The statute of Iowa regulating general assignment- for the benefit of creditors provides that no general assignment of property by an insolvent debtor or the contemplation of insolvency for the benefit of creditors shall be valid unless it be made for the benefit of all his creditors in proportion to the amount of their respective claims.

As construed by the supreme court of Iowa, the meaning
134 of this statute is that an insolvent debtor, if he proposes
making a general assignment of his p-operty, must not accompany the same with preferences to special or favored creditors. If he does do so, the general assignment will be thereby rendered void.

It is not necessary, in order to defeat the assignment, that the preferences shall be contained in the deeds of assignment. The preferences may be made by the execution of others deeds or instruments, the question being wheather all the instruments, including the deed of assignment, formed a part of a general disposition of the debtor's p-operty. Under the ruling of the supreme court of Iowa a deptor may, although insolvent, execute mort*ageges* upon a part of his p-operty to some one to secure one or more of his creditors and convey other property in payment to other creditors and immediately follow the execution of these conveyances with a general assignment and the latter may be valid. To defeat the latter
135 it must appear that the general several conveyances, including the assignment, formed part of general disposition of his property by the insolvent debtcr, or, in other words, that when he executed the mortgages or conveyances for the benefit of certain creditors he did so in contemplation of following the same with the execution of a general assignment. As I understand the law applic*ation* to this statute, an insolvent debtor, whilst making the struggle to keep along in business, may secure or pay one or more of his creditors and may then become convinced that it is useless to continue the struggle, execute a general assignment for the benefit—the common benefit—of all his creditors. Even though the execution of the assignment might, in point of time, follow within a few hours after the execution of the preferences, that fact alone would not invalidate the assignment. If, however, it appears that the debtor is insolvent, and that he has given up the struggle to keep his business moving and is contem-

plating the disposition of his p-operty among his creditors,
136 and has in contemplation the making of an assignment,
and he should execute conveyances as payment, as security, upón a part of his p-operty for the benefit of part of his creditors and should then follow the conveyances by the execution of a general assignment, such facts would justify the conclusion that all the conveyances, including the deed of assignment, formed in fact parts of one general disposition of his property by the debtor, and in such case the assignment would not be valid. In the case now on trial it appears that on the 18th day of November, 1884, H. P. Lane was insolvent. One suit had been commenced against him. An attorney having overdue claims for collection called upon him on the 18th and presented — for security or payment. At the interview between the attorney and Mr. Lane the question came up of making an assignment—was discussed.

It is clearly evident that at that time Mr. Lane knew he could not longer continue his business except by some arrangement with creditors.

137 After the close of the interview with the attorney — New Albin, on the 18th, Lane went to Lansing and executed a deed of realty to his wife and a mortgage to certain wards to whom he was indebted. Lane testifyed that he did not reach a conclusion to make an assignment until the morning — 19th, when he heard from Chicago from the firm that had sued him, and that was the first time he had concluded to execute the assignment.

On the 20th of November the assignment was drawn and signed at Lansing, and Bock, the assignee, went with Lane to the county-seat, Lane having the deed to his wife and the mortgage to his wards in his possession and Bock having the deeds of the assignment. The deed to the wife and the mortgage to the wards were filed for record, and soon after the assignment was filed. Lane testifies that the deed to his wife he had delivered to her on the 18th and she handed it back to him when he left New Albin, for the purpose of having him carry it to Waukon for *for* record. He also
138 testifies that the mortgage to the wards was not out of his possession until he filed it for record.

Under the undisputed facts in this case it is clear that on the 18th of November, before the execution of the deed and mortgage, Lane knew that he must take some action in regard to the disposition of his property or else his creditors — resort to the proper legal remedies for reaching the same. He certainly had in contemplation the idea of making an assignment on the morning of the 18th, and there is nothing to show that his idea was ever abandoned. The assignment was in fact executed, and its execution and recording are so intimately connected with the execution and recording of the deed and mortgage to the wife and wards as to form a parts of the general disposition of the debtor property, which was effectuated by giving the preferences to part of his creditors and executing a general assignment for the benefit of *of* the remainder. This being so, the assignment is void and conveyed no right in the goods in ques-
139 tion to the plaintiff, and upon this ground he cannot recover

in this case; and your verdict must therefore be for the defendants.

Plaintiff excepts to the whole charge.

140 And be it further remembered that thereupon the plaintiff in due time & form excepted to the refusal of the court to allow plaintiff to proceed to the jury upon the facts of the case, and then & there duly excepted to the ruling of the court that plaintiff had failed to make out his case, & then & there duly excepted to the instruction given to the jury that their verdict must be for the defendants, & then & there duly excepted to so much of the charge of the court as is embraced within paragraph one thereof; and also to so much as is embraced within paragraph two; which several exceptions were duly allowed by the court and ordered to be made part of the complete bill of exceptions of said trial.

141 Be it further remembered that the jury, having been so ordered by said court, returned their verdict for the defendants.

And to the end that the several matters & things herein recited and set forth may be part of the record of the cause, the plaintiff tenders this bill of exceptions as a general, full, and complete bill of exceptions and containing the several matters & rulings ordered by the court to be made part of such complete bill, and now prays that the same may be duly signed as such complete bill & be made part of the record of this cause; which is done this 9th day of April, 1886.

O. P. SHIRAS, *Judge.*

Endorsed on back thereof: Filed 9th day of April, 1886. A. Hobbs, deputy clerk.

142 *Assignment of Errors.*

To the Supreme Court of the United States:

William O. Bock, assignee of H. P. Lane, comes now & says that in the record and proceedings as also in the rendition of the judgment of a plea in the circuit court of the United States for the northern district of Iowa, eastern division, between the said William O. Bock, assignee of H. P. Lane, as plaintiff, and George D. Perkins, W. H. Thrift, and Timothy Hopkins, as defendants, manifest error hath happened, to the great damage of the said William O. Bock, and in the following particulars, in and upon each of which the said William O. Bock assigns error, to wit:

I.

The said court erred in not passing upon and not sustaining plaintiff's motion to remand said cause to the State court and
143 in retaining jurisdiction thereof, said controversy herein being one not arising under the Constitution or laws of the United States, and the said circuit court had no jurisdiction to retain, try, and determine the same.

II.

The court erred in refusing to allow the case to be argued to the jury and in directing the jury to return a verdict for the defendant.

III.

The court erred in its construction of the assignment offered in evidence as being merely a partial assignment of the property of the assignor and not a general assignment, which it pretended to be.

IV.

The court erred in all of its charge to the jury, and especially in the following part thereof:

"As I construe this instrument executed by H. P. Lane, it amounts only to a partial assignment. True, it is headed general as-
144 signment, and there are recitals in it which would be entirely proper, as forming part of a general assignment, but when we come to the conveying part of the instrument we find it declaring that there is conveyed to Bock all of the property described in Schedule 'A' attached to the instrument, and in this schedule is not found any reference whatever to the stock of goods; it includes certain realty and a large number of notes and accounts, but does not include the stock of goods. It is not shown by the evidence that any other schedule was to be attached, or that Schedule 'A,' as it now appears, is imperfect. In other words, the instrument in the form it now has is the instrument executed by H. P. Lane and under which the plaintiff claims the title & right to the goods in controversy. Unless, as it now stands, it conveys the goods to the plaintiff, he has no title or right thereto and no interest,
145 and consequently cannot maintain this action for their value against the defendants. As I have already said, as I construe this instrument it must be held to be a partial assignment, only conveying the property set forth in Schedule 'A.' It does not therefore include the goods in question, & the plaintiff therefore has failed to show title in the goods & cannot maintain this action, & your verdict must be for defendants."

V.

The court erred in that portion of his charge to the jury as follows:

"If, however, I am wrong in this ruling & it should be held that this instrument does convey the title of the goods to the plaintiff as assignee, or, in other words, if this instrument is to be held to be a general assignment, then another question would arise, and as it has been fully presented by the evidence I deem it my duty
146 to rule thereon, in order that all the questions material to the parties may be presented to the appellate court."

VI.

The court erred in each and every part of its charge to the jury contained in the second paragraph thereof in charging that said

general assignment was a part of a number of conveyances, some of which were intended to give a preference, and was therefore void.

VII.

The court erred in the second paragraph of its charge in directing the jury to find for the defendant-.

VIII.

The court erred in entering judgment for defendant-.

IX.

The court erred in overruling plaintiff's motion for a new trial.

X.

The court erred in not granting a new trial because the
147 verdict was contrary to the evidence & the law of the case, and the record and proceedings aforesaid, together with a prayer for reversal, are herewith presented to the Supreme Court of the United States, with a writ of error, sued out by the said William O. Bock to such effect, and the said William O. Bock prays that the errors may be considered and corrected and the judgment aforesaid reversed, annulled, and held for naught, and that the said William O. Bock may be restored to all things which he has lost by occasion and reason of the said judgment.

FOUKE & LYON,
Attorneys for William O. Bock, Plaintiff in Error.

148 *Prayer for Reversal.*

To the Supreme Court of the United States:

Comes now William O. Bock and says that in the record & proceedings, as also in the rendition of the judgment of a plea in the circuit court of the United States for the northern district of Iowa, eastern division, between William O. Bock, assignee, &c., as plaintiff, and George D. Perkins, W. H. Thrift, and Timothy Hopkins, as defendants, manifest error hath happened, to the great damage of the said William O. Bock, assignee, &c., and the said William O. Bock, assignee, &c., hath thereupon sued out a writ of error that the record and proceedings may be sent to the Supreme Court of the United States, to the end that error may be corrected and full and speedy justice done: Now, therefore, the said William O.
149 Bock, assignee, &c., as plaintiff in error, humbly prays for the correction of such errors and for reversal of said judgment, and thus will ever pray.

FOUKE & LYON,
Attorneys for William O. Bock, Plaintiff in Error.

150 UNITED STATES OF AMERICA, } ss:
Northern District of Iowa, }

I, A. J. Van Duzee, clerk of the circuit court of the United States for the northern district of Iowa, do hereby certify that the foregoing is a true and perfect transcript of the record of said cause as agreed upon by counsel to be certified in accordance with their stipulation this day filed in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in Dubuque, in said district, this 8th day of October, A. D. 1887.

[Seal Circuit Court U. S., Northern District of Iowa, Dubuque.]

A. J. VAN DUZEE,
Clerk U. S. Circuit Court, Northern District of Iowa.

Endorsed on cover: N. Iowa C. C. U. S. No. 285. W. O. Bock, assignee of H. P. Lane, plaintiff in error, *vs.* George D. Perkins, W. H. Thrift, and Timothy M. Hopkins. Filed October 27, 1887.

Office Supreme Court U. S.
FILED,
MAR 26 1891
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States,

OCTOBER TERM, 1890.

No. 285.

W. O. BOCK, ASSIGNEE OF H. P. LANE,
Plaintiff in Error,

vs.

GEORGE D. PERKINS, W. H. THRIFT and TIMOTHY M. HOPKINS,
Defendants in Error.

In Error to the Circuit Court of the United States for the Northern District of Iowa.

BRIEF AND POINTS FOR PLAINTIFF IN ERROR.

H. B FOUKE,
D. E. LYON,
Of Counsel.

THE TIMES CO., PTRS, DUBUQUE, IOWA.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1890.

No. 285.

W. O. BOCK, Assignee of H. P. Lane,
Plaintiff in Error,
vs.
GEO. D. PERKINS, W. H. THRIFT and TIMOTHY M. HOPKINS,
Defendants in Error.

BRIEF AND POINTS FOR PLAINTIFF IN ERROR.

Statement.

This is an action brought by plaintiff as assignee of H. P. Lane, to recover the value of a stock of merchandise, worth ten thousand dollars, which it is alleged the defendants in error wrongfully and illegally took possession of and converted the same to their own use (Rec., pp. 2–3)

The action was originally commenced in the District Court of Dubuque county, Iowa, and was subsequently removed by the defendants to the Circuit Court of the United States for the Northern District of Iowa (Rec., p. 4).

The only grounds on which a removal was asked, was that the taking of the goods complained of, was by the defendants, under and by virtue of *writs of attachment, issued out of the Circuit Court of the United States* for the Northern District of Iowa in an action pending in said Court, and directed to said *Perkins as the United States Marshal* (Rec., p. 5).

The plaintiff resisted the motion in the State Court (Rec., p. 7) and moved to remand from the Federal Court (Rec., p. 8).

It is confessed in the answer that the defendant, Perkins, was the then United States Marshal for the Northern District of Iowa, and the defendants, Thrift and Hopkins, were his deputies (Rec., p. 9).

The defendants in Answer deny each and every allegation. Defendants say:

II.

"That the alleged general assignment was not made for the benefit of all the creditors of the said H. P. Lane in proportion to the amount of their respective claims, and further say that the same was accompanied and preceded by preferences made by said Lane when insolvent and in contemplation of insolvency, and in contemplation of said alleged general assignment and intended to be a part thereof, and intended to prevent said alleged general assignment from operating as a general assignment of property by said Lane for the benefit of all his creditors in proportion to the amount of their respective claims" (Rec. p. 9).

The defendants, by amendment, further answered, admitting that the merchandise in question was taken possession of, but under and by virtue of three writs of attachment issued out of the Circuit Court of the United States for the

Northern District of Iowa, against the property of H. P. Lane (Rec., pp. 11–12 and 13). In the amended answer it is further alleged:

> "That said property was, at the time referred, to the property of said Lane, and not the property of the plaintiff, and was liable to be taken under the writs of attachment described" (Rec., p. 10, par. 3; p. 14, par. 3).

The plaintiff claims the merchandise in question, by vir tue of a general assignment made by H. P. Lane to him on the 20th day of Nov., 1884.

The action was tried to a jury in April, 1886. The Court at the close of all the evidence, directed the jury to return a verdict for the defendant, on the ground that the goods in question did not pass under the assignment.

The question at issue in this Court, and the Assignment of Error, cannot be better presented than by briefly setting out portions of the evidence bearing on the ruling of the Court

On the trial the assignment was introduced in evidence and is as follows:

GENERAL ASSIGNMENT

This indenture, made the 20th day of November, A. D. 1884, between Henry P. Lane, of New Albin, Allamakee county, and State of Iowa, of the — part, and Wm. O. Bock, of said county and State, of the second part;

Whereas the said Henry P. Lane is justly indebted in considerable sums of money and has become unable to pay the same with punctuality or in full and is now desirous of making a fair and equitable distribution of his property among all his creditors, now this indenture witnesseth: That the said party of the first part, in consideration of the premises and of the sum — one dollar to him paid by the party of the second

part, the receipt whereof is hereby acknowledged, has granted, bargained, sold, and assigned, and does hereby grant, convey, and assign, unto the said party of the second part and to his assigns forever all the lands and all the personal property of every name and nature whatsoever of the said party of the first part, more particularly enumerated and described in the schedule hereto annexed, marked Schedule "A," or intended so to be, upon the following trusts, viz: To take possession of said lands and personal property and sell said lands, unless otherwise directed by the circuit court of Allamakee county, State of Iowa, on notice published as in case of sales of real estate on execution, and dispose of said personal property upon such terms as in his judgment may appear best, but not on credit, and hold the proceeds of sales of all of said lands and personal property for distribution among all the creditors of said party of the first part, in accordance to such orders and directions as may from time to time be made by said circuit court, and shall, after final settlement and distribution be made and all the reasonable expenses, rents, taxes, assessments, commissions and allowances are paid, return any surplus there may be of the proceeds of the sales of the assigned property to the party of the first part or his assigns; and also to reconvey, reassign to him or them any real or personal property remaining unsold. Schedule B, hereto annexed, contains, as near as I can state, a list of all my creditors and the amount of their respective demands, and both of said schedules, A and B, are hereby made part of this assignment.

Witness my hand the day and year first above written.

HENRY P. LANE.

In presence of—

SAMUEL H. KINNE.

STATE OF IOWA, }
Allamakee County, } ss:

On this 20th day of November, A. D. 1884, before me,

Sam'l H. Kinne, a notary public in and for said county, personally appeared Henry P. Lane, to me personally known to be the identical person whose name is affixed to the above instrument of assignment as grantor, and acknowledged the execution of the same to be his voluntary act and deed for the purposes therein mentioned.

[SEAL]

Witness my hand and notarial seal the date last above written.

SAMUEL H. KINNE,
Notary Public.

I hereby accept the trusts reposed in me by the above assignment and agree to execute the same.

Dated this 20th day of November 1884.

WM. O BOCK.

In presence of -
SAM'L H. KINNE.

SCHEDULE "A," referred to in the Annexed Assignment, Containing an Inventory of the Estate, Real and Personal, of Henry P. Lane.

REAL ESTATE.

Lots 1, 3, 4, 6, 7, 11, sect. 19, t'w'p 100, R. 3.
" 1, 7, sect. 30, t'w'p 100, R. 3.
S. W. ¼ of N. W. ¼ sect. 19, t'w'p 100, R. 3.
20 feet off N. W. end lot No. 163, village of New Albin, Ia.; lot 124, village of New Albin, Ia,; One set hay scales.

PERSONAL PROPERTY.

P. C. Grace	$20 49
Chas. Little	4 20

Here follow 150 other names of persons indebted to the assignor in the schedule attached.

STATE OF IOWA, }
Dubuque Co., } ss:

I, Henry P. Lane, of said county, being duly sworn, depose and say that the foregoing inventory contains, according to the best of my knowledge, a true statement and account of my estate, both real and personal.

HENRY P. LANE.

Subscribed and sworn to before me this 20th day of November, 1884, by Henry P. Lane.

Witness my hand and seal.

[SEAL] SAM'L H. KINNE,
Notary Public.

SCHEDULE B, Referred to in Annexed Assignment.

LIST OF CREDITORS.

G. S. C. Scott	$142 28
Chamberlain & Co	68 25

Here follow fifty other names of persons and firms scheduled as creditors of the assignor in the schedule attached, among which are—

C. P. Kellogg & Co.
M. D. Wells & Co.
H W. King & Co.

STATE OF IOWA, }
Allamakee Co., } ss:

I, Henry P. Lane, of said county, being duly sworn, depose and say that the foregoing Schedule "B" contains a true list of all my creditors and the amount of their respective demands.

HENRY P. LANE.

Subscribed and sworn to before me and in my presence the 20th day of November, 1884, by Henry P. Lane.

Witness my hand and seal.

[SEAL] SAM'L H. KINNE,
Notary Public.

On the back of said assignment was the following:

"ASSIGNMENT FOR BENEFIT OF CREDITORS.
Henry P. Lane to Wm. O. Bock."

STATE OF IOWA, }
Allamakee Co., } ss:

Filed for record the 20th day of November, 1884, at 4.10 o'clock p. m., and recorded in Book "K," on pages 504 to 510, inc., of chattel mortgage records.

J. D. BRENNAN, Recorder,
By E. D. PURDY, Deputy.

W. O. Bock swears that the value of the goods taken was between 8,000 and 9,000 dollars. (Rec , p. 22). N. H. Ransom puts the value at 8,500 to 9,000 dollars. (Rec., p. 28).

The following extracts from the evidence nearly *todidem verbis* proves conclusively that the assignor *intended and believed that all the personal property owned by him, and including the merchandise in question, passed under the assignment to the assignee.*

The assignee took possession *of all the property of Lane, the assignor, including the property in question.*

Henry P. Lane the assignor testified:

"That he was in business in New Albin, Iowa, ten years. That he instructed S. H. Kinne to draw up an assignment of his property; the assignment now in Court was the one he executed.

Q. Where was the paper executed?

A. At Lansing, in Mr. Kinne's office.

Q. On the day that appears here?

A. Yes sir. Mr. Kinne, Mr. Bock, myself, and I think Mr. Binfrey was present at the time.

Q. Where was the stock of goods at that time?

A. At New Albin.

Q. After this paper was signed and acknowledged by you, what was next done?

A. Mr. Bock closed the store and inventoried the goods.

Q. What was done with the stock there so far as you are concerned, and so far as Bock is concerned?

A. Bock took possession. I gave him possession. I gave him possession for the purpose of selling the goods and dividing the proceeds among the creditors Under the contract that that instrument was shown up under and gave him possession

Q. I'll ask you what Mr Bock did after he had taken possession of the stock of goods?

A. He took possession of the whole stock of goods, closed up the store and commenced to take an inventory, and he was taking an inventory the last that I knew of the matter. (Rec., pp. 17-18).

Q. What property, if any, did you have left after you had executed this assignment, and after Mr. Bock had taken possession under this paper you call a general assignment?

A. I had no property remaining.

Q. State all the conversations you had there, so that the jury will know what you refer to. What was said about these goods, what goods you were talking about—if it was this stock?

A. The substance or the language was: I says, 'Will, (meaning Mr. Bock) you go and take charge of the business and Mr. Kinne will counsel you, and I would advise you to put these goods down a little above cost, and also sort up from time to time, and try and get closed out by April 1st, and said something about outstanding debts, and told him to be diligent in collecting them" (Rec. pp. 19–20).

W O. Bock in his own behalf testified:

"That he had been in the mercantile business at New Albin for the past twelve years. That prior to Nov. 20, 1884, he was engaged by Mr. Lane in that business.

Q. Did you go to Lansing on or about the 20th of November with Mr. Lane, or did you find Lane there, and what did you do in regard to an assignment of his property?

A. We both went together.

Q. Was there a paper executed by Mr. Lane at that time?

A. Yes, sir.

Q. I will ask you if after it was acknowledged the paper was delivered to you; if so, by whom?

A. I can't say who delivered it to me, but I received it in Mr. Kinne's office. I took possession of the goods at New Albin. I went and had the paper recorded first

Q. After you got back to New Albin, what did you do?

A. Took inventory of the stock of goods owned by Mr. Lane.

Q. Was it the same or different stock from the one you were doing business with for Mr. Lane previous to the time the assignment was made?

A. The same stock. *I took possession of the stock of goods; took an inventory of them with the clerk, opened up the store and commenced selling the goods.*"

This witness proves that the Deputy Marshal came to the store and said he had papers to serve on *that stock of goods*. He was shown the assignment but demanded and got the key to the store and locked the door and took possession of the goods.

Witness says he took the goods by virtue of the assignment to him from Lane, and that Mr. Lane had no other goods besides the stock now in question, situated at New Albin when I took them under the assignment (Rec., pp. 20–21 and 22). The witness Bock further proves as follows:

> "When Mr Hopkins came there I stated to him the manner in which I came in possession of the property. I showed him the papers of assignment and told him that the goods belonged to me as assignee. He looked at the assignment and said it was perfectly satisfactory, and that I was the assignee" (Rec., p. 29).

T. M. Hopkins, a defendant, testified:

> "When I got to New Albin, Bock had possession of the goods. I showed him my writs—and he showed me the assignment. He claimed to be in possession as the assignee of H. P. Lane. Before I took the goods I knew he claimed to be in possession of them as assignee" (Rec., p. 32).

The foregoing facts and statements would seem to make it perfectly clear that the assignor, Lane, intended to assign to the plaintiff, Bock, *all the lands and all the personal property of every name and nature whatsoever of the said party of the first part.* Every thing was open and above board in reference to the matter. No evasion or infraction of any kind, of the law of Iowa by either the assignor or assignee, as appears from the foregoing statement, was attempted. The bill of exceptions shows (Rec., p. 42), that:

> "The Court announced that it was useless to proceed to the jury in argument upon the facts, for the reason that in the judgment of the Court the plaintiff had failed to make out his case and that it was the duty of the Court to instruct the jury to find for the defendants."

The jury then found in accordance with this direction, a verdict for the defendants, to which ruling and direction the plaintiff generally and specifically excepted (Rec., p. 46).

Assignment and Specification of Errors.

FIRST

The Court erred in not sustaining the plaintiff's motion to remand the cause to the State Court on the ground that the said Circuit Court had no jurisdiction to retain and try the cause.

SECOND.

The Court erred in refusing to allow the case to be argued to the jury, and in directing the jury to return a verdict for the defendants.

THIRD.

The Court erred in its construction of the assignment offered in evidence, as being merely a partial assignment of the property of the assignor, and not a general assignment.

FOURTH.

The Court erred in each and every part of its charge to the jury; contained in the second paragraph thereof, in charging that said general assignment was a part of a number of conveyances, some of which were intended to give a preference and was therefore void. And erred in directing the jury to find for the defendants, in the second paragraph of the charge.

FIFTH.

The Court erred in not granting a new trial for the reasons stated therein (Rec , p. 14).

POINTS.

First Point.

The defendants in this case were trespassers, and the Circuit Court erred in not ordering the case remanded to the State court.

It is not believed by counsel for plaintiff in this case, and we may add, that the profession generally, in the Eighth Circuit, do not believe that on such a state of facts as this case presents, any question of law arises under the Constitution and laws of the United States, that warrants a removal of the case into the United States Court.

There is no denial of the ownership of the plaintiff. Neither the Court nor the writs of attachment authorized the Marshal to take the goods that belonged to the plaintiff, Bock, on a writ against Lane; when he did so he became liable in an action of trespass for the damages incurred by Bock, and such a wrong on the part of the Marshal does not present a question of Federal cognizance.

The action of trespass against the Marshal was well brought in the State court and should there have been determined.

Buck v. *Colbath*, 3 Wall, 334.
Day v *Gallup*, 2 Id., 97.
Denny v. *Bennett*, 128 U. S., 489, 499.
Metcalf v. *Watertown*, 128 U. S., 586.
Lammon et. al. v. *Fensier*, 111 U. S., 17.
Leroux et. al. v. *Hudson*, 109 U. S., 468, 476.

Second Point.

I.

The questions at issue in this Court are these:

a. Did the assignment in question convey to the plaintiff the goods in question?

b. Did the assignment and the mortgages executed by Lane, the assignor, constitute one and the same transaction, thereby rendering the assignment void, because of a preference to the mortgagees?

On these two grounds the Court held as a matter of law that the plaintiff could not recover, and directed a verdict in favor of the defendants The construction of the Court, holding the assignment to be partial and as not conveying the goods in question, cannot be sustained. On this point, among other things, the Court charged the jury as follows: (Rec., pp 43-45)

"If, however, the instrument in question did not include the goods in question and did not transfer the title thereof to the plaintiff, then the title of the goods still remaind *in* H. P. Lane, and the defd. Hopkins was justified in levying the writs thereon and taking possession of them thereunder. Under the statutes of Iowa, as construed by the supreme court of the State, a debtor has the right and power to execute a partial assignment of his property for the benefit of creditors, or he may execute a general assignment for their benefit. If he proposes to make a general assignment, then he must assign all of his property not exempt from execution for the common benefit of all his creditors. If, however, he assigns only part of his property, then it will be only a partial assignment. As I construe this assignment executed by H. P. Lane, it amounts only to a partial assignment. True, it is headed general assignment and there are recitals in it which would be entirely proper as forming part of a general assignment, but when we

come to the conveying part of the instrument we find it declaring that there is conveyed to Bock all of the property described in Schedule "A" attached to the instrument, and in this schedule is not found any reference whatever to the stock of goods. It includes certain realty and a large number of notes and accounts, but does not include the stock of goods. It is not shown by the evidence that any other schedule was to be attached, or that Schedule "A," as it now appears, is imperfect.

In other words, the instrument, in the form it now has, is the instrument executed by H. P. Lane and under which the plaintiff claims the title and right to the goods in controversy Unless, as it now stands, it conveys the goods to the plaintiff, he has no title or right thereto and no interest therein, and consequently cannot maintain this action for their value against the defd., as I have already said. As I construe this instrument, it must be held to be a partial assignment only, conveying the property set forth in Schedule "A." It does *not* therefore include the goods in question, and the plaintiff therefore has failed to show title in the goods and cannot maintain this action, and your verdict must be for defd's."

The words of the assignment are as broad and comprehensive as language can make them, "does hereby grant, convey and assign * * * * *all* the lands, and *all* the personal property of *every name and nature whatsoever* * * * among *all* his creditors."

With this comprehensive language and clearly expressed intention on the part of the assignor, the trial Court held, that because Schedule A did not contain a reference to the stock of goods, that thereby he intended to qualify and limit th broad language previously used, or that he only intended to make a partial assignment.

The construction given by the Court is extraordinary in

its terms, and places an interpretation on the assignment which we think violates every canon of construction found in commercial usage. Not only so, but the statute of the State regulating just such a state of things as the assignment presents, was not given any force or application. There is no statute in Iowa providing for, or permitting, partial assignments. The common law on that subject obtains in Iowa, and will be noticed hereafter.

All assignments are to be general and the assignee at all times to be subject to the order of the Court or Judge.

An imperfect schedule, or none at all does not invalidate the assignment under the laws of Iowa.

CHAPTER VII, CODE OF IOWA.

SECTION 2115. No assignment of property by an insolvent, or in contemplation of insolvency, for the benefit of creditors, shall be valid, unless it be made for the benefit of all his creditors in proportion to the amount of their respective claims.

SECTION 2117. The debtor shall annex to such assign ment an inventory, under oath, of his estate, real and personal. * * * * * *; but such inventory shall not be conclusive as to the amount of the debtors estate; and such assignment shall vest in the assignee the title to any other property belonging to the debtor at the time of making the assignment.

* * * * * *
* * * * *

SECTION 2123. The assignee shall at all times be subject to the order and supervision of the Court or Judge * * *. The assignee shall dispose of all personal property and divide the proceeds * * *, * * * * *

SECTION 2124. No assignment shall be declared fradulent or void, for want of any list or inventory as provided in

this chapter. * * * The Court may on application compel the appearance of the debtor before the Court * * * and he may then and there be examined under oath as to the amount and situation of his estate, * * *.

Under the evidence and the assignment, plaintiff's case (on this point) could well be rested on the sections of the Code of Iowa *supra*. The legislative intent is very plain, that *no assignment shall be declared fradulent or void for want of any list or inventory*. This is very plain language, and this written law is not questioned. It would seem to cure the omission, and uphold the assignment, in the absence of the goods being enumerated in Schedule A.

It was the intention of the assignor to *enumerate* the goods in Schedule A. He says so in the document: "*and does hereby grant, convey, and assign, unto the said party of the second part and to his assign forever * * * and all the personal property of every name and nature whatsoever of the said party of the first part, more particularly enumerated and described in the schedule hereto annexed, marked Schedule "A" or intended so to be.*"

What was intended so to be? Evidently *all the personal property was intended to be enumerated* in Schedule A. Nothing can be clearer. The Code of Iowa was open before the lawyer who made the assignment. He made the assignee subject to the order of the Court of the county, and he well knew that the assignment was valid *without the goods being enumerated in the schedule.*

Such is the written law of Iowa as we have shown, and such is the construction given the Code in Iowa, and in many other States where cognate questions have arisen.

In *Meeker* v *Sanders*, 6th Iowa, 61, the first case in the State, it involved the validity of an assignment where there

was no schedule and one of the assignees names was omitted.

The deed conveyed all the goods, notes, etc. The assignee took possession. Stockton, J., states the rule of construction as follows: (Page 67.)

> "We think, however, there can be no mistake as to the trust upon which the property, in this instance is conveyed. It is sufficiently declared that it is for the purpose of securing the claims of all the creditors. * * * When the intention of the grantor can be ascertained, with reasonable certainty, the want of minute accuracy of language, and the disregard of the usual forms should not render the instrument void. Nor is the fact that the deed *contains no schedule* of the debts intended to be secured; *that no inventory* is given of the property conveyed; that the rights of creditors are not distinctly defined * * * * All these things, though they, in some sense, constitute an objection to the deed are not sufficient to justify us in holding it on that account void."

In *Drain et. al.*, v. *Mickel*, 8th Iowa, 438. This is a case where, instead of the assignee filing a full and true inventory and valuation, *as the law plainly required*, he had this done by two other persons, and the inventory was defective. The rule of construction is stated as follows: (p. 446.)

> "We do not think a just interpretation of the act requires so rigid a view as to regard an *imperfect or defective inventory* as an absolute nullity." * * * * * It is to be remembered that he may make subsequent reports at any time and that he is under the supervision and subject to the orders of the Court who may require him to report upon the condition of his trust and may, at any time, rectify any errors, cause defects to be cured and imperfections to be amended."

In *Price, Assignee* v. *Parker*, 11 Iowa, 144, a case in which the assignor did not file any inventory, as required by law, says Wright, J.:

> "The assignment was not void for want of an inventory required by the first section of the act of 1857. The eighth section of said act expressly declares that no assignment shall be declared fraudulent or void for want of said list. This being the unequivocal declaration of the statute where there is an entire failure to annex an inventory, there would of course be much less ground for claiming that the assignment was fraudulent where, as in this case, the instrument was made. acknowledged and filed for record, with full notice to the officer before the levy, and an inventory * * * recorded afterwards."

In *Wooster & Co.* v. *Stanfield et. al.*, 11 Iowa, 128, the Court again decid :

> "That a general assignment made *bona fide* for the benefit of the creditors, under the laws of the State, will not be declared void for a failure to make an inventory of the assets and liabilities as required by law."

In *Schaller, Assignee* v. *Wright*, 70 Iowa, 667, holding under the assignment law that a general assignment vests in the assignee the title to all the property of the assignor even though it is not described nor mentioned in the assignment.

In *Loomis* v. *Griffin et. al.*, 78 Iowa, 482, the latest case citing with approbation the first case, 6th Iowa, 68, that where the conveying part of an assignment was of "all and singular, each and every article and thing owned by me, in the nature of chattel property, not exempt from sale on execution, and each and every right and credit owned, held and belonging to me." The Court held

"That it must be presumed until the contrary is shown that it was designed to include all the property subject to execution which the assignor then owned."

These Iowa cases having put a construction on the sections of the Code, *supra*, regulating assignments, are of controlling authority in this Court.

Chicago Union Bank v. *Kansas City Bank*, 136 U. S., 223, 235.

In 1854 the precise question in this cause came before this Court from Louisiana in *The President, etc. of Bank of Tennessee* v. *Horn*, 17 *Howard*, 157. In the schedule of property a lot was *intended to be included*, but which was so erroniously described (says the Court) that it could hardly be identified by the schedule alone, as a part of the estate. The Court say:

"Nor can the imperfect or erronious description in the schedule have any influence on the decision. For it is well settled by the decisions of the courts of Louisiana that all the property of the insolvent, whether included in his schedule or not, passes to his creditors by the cession. (Citing cases.) Consequently, if under the ambiguous or erronious description in the schedule, this lot must be regarded as omitted, it still passed by the cession and Corney had no remaining interest in it."

In *Cunningham* v. *Norton*, 125 U. S., 77, the Texas assignment law is considered by this Court. Many of the sections of the law of Texas are similar to the laws of Iowa; notably Sec. 2, requiring the inventory of property, and Sec. 10, declaring that no assignment shall be declared fraudulent or void for want of any inventory or list. In this case it was claimed that the assignment did not convey all the assignor's

property, to which it is said by this Court on page 89 of its opinion:

> "It is a sufficient answer to say that it does, in terms, convey all his lands, tenements, hereditaments, goods, chattels, property and choses in action of every name, nature and description, wheresoever the same may be, * * *."

And it is held by this Court that the general description was sufficient under the statute of Texas to convey all the debtor's property.

> "The first section of the act declares that the assignment, however expressed, shall be construed to pass all the debtor's real and personal estate whether specified or not."

Brasheir v. *West*, 7 Peters, 608, 614, a case in which the construction of an assignment without any schedule was involved The Court sustained the assignment.

The Court of appeals of New York in the case of *Turner, Assignee*, v. *Jaycox et al.*, 40 N. Y., 470, in a full and elaborate opinion in a case involving *the precise same question as we have here*, uphold an assignment conveying "all goods, chattels, merchandise, bills, bonds, notes, and property of *every name and nature whatsoever*," "*more particularly enumerated and decribed in the schedule hereto annexed.*"

The schedule only contained a reference to and a description of *two pieces of land and an account of the debts owing to them.* No allusion was made in it to the tangible personal property owned by the assignors.

The Court after showing that the omission to set out the merchandise in the schedule could not by any means indicate

an intention to limit or qualify the broad and comprehensive language found in the conveying part, on that point say:

> "The case therefore was brought within the principle of construction prohibiting a false or erronious addition from violating what had been previously, sufficiently and fully described as a portion of the subject matter intended to be transferred by the instrument." (Citing cases on the ruling.)

In *Platt* v. *Lott*, 17 N. Y., 478. A case in which the facts are just like those in the case at bar.

The assignment conveyed *everything*, "the same being more fully and particularly enumerated and described in a schedule thereof, hereunto annexed marked Schedule A. The schedule *did not include* the property in controversy, and the same was taken on execution against the assignors. It was contended that the general words of the assignment were limited and controlled by the specifications contained in the schedule, and nothing passed to the assignee, except property enumerated therein. Selden, J., states the rule of construction as follows:

> "In construing contracts and other written instruments, resort is had to a variety of legal rules for the purpose of aiding in their interpretation; but all other rules are subordinate to that primary rule which requires that every such instrument shall be construed according to the intention of the parties. * * * * whether the construction to which it tends, is, or is not, in accordance with *those minor rules*, which are merely auxiliary to the one great paramount rule referred to."

The Court decides that the broad language in the conveying part of the assignment cannot be controlled by the par-

ticular and specific reference to the schedule, which the Court says:

> "By no means indicates an intention to qualify or limit the broad and comprehensive language previously used."

In *Emigrant Industrial Savings Bank* v. *Roche et. al.*, 93 N. Y., 374, practically the same question is again decided, and the doctrine laid down in 17 N. Y. 478; 40 *id*, 470; reaffirmed and deciding that a reference to the schedule cannot limit or qualify the broad language of the assignment.

The following cases in the courts of New York also hold that assignments conveying all lands and personal property includes all personal property of the assignor though none was enumerated or described in the schedule:

Kellogg v. *Slawson*, 15 *Barb*, 56.
Birchell v. *Strauss*, 28 *Barb*, 293.
Evans v. *Chapin*, 20 How Pr., 289.
Keyes v. *Brush*, 2 *Paige* Ch, 311.

In *Nye* v. *Van Housan*, 6 Mich., 330, the assignment, after granting all the property (by name) of every name and nature, proceeds as follows:

> "As the same is more particulary described in the schedule *proposed to be hereafter annexed* to this instrument marked Schedule A."

The only schedules attached to the assignment were lists of preferred and non-preferred creditors, B and C. The assignors never made the Schedule A referred to in the deed. The Court in deciding the case construe the whole instrument and held that it could not be limited in its operation by any

special clause or words which would sacrifice the intent of the assignor, as manifested by the whole instrument.

> "The deed," says the Court, "clearly manifests an intention by the Wallaces to assign all their property for the purposes expressed in the instrument, and that it should presently operate; and such we think, was its effect, notwithstanding the reference to a schedule."

In *Ely, Clapp & Co.* v. *Hair*, 16 B. Mon. Ky., 230, 239, an assignment very similar to the one in question, but the schedule was to be made out,—when it was made did not convey all the assignor's property. The Court, in clear and concise terms, held that the general words of conveyance in the deed were not limited by reference to the schedule and that the objection on that ground was wholly invalid.

In *Clark* v. *Fen*, 62 Ala., 243, a well considered case, sustains an assignment though the schedule (as in the case at bar) did not embrace all the personal property.

Union Nat'l Bank v. *The Bank of Com.*, 94 Ill., 271, in which it is held that a schedule purporting and intending to be all the creditors of the assignor, and it happens that one creditor is not named. That fact, the Court held, would not preclude him; placing the decision on the rule of construction found in *Platt* v. *Lott*, 17 N. Y., 478.

In *Robbins* v. *Embry*, 1 *Sm. and M.* Ch, 207, 208, 273 and 274, an assignment is upheld conveying *all* the property without any schedule.

Hayes v. *Doane*, 11 N. J. Eq., 84, is an authority sustaining plaintiff's view.

The Supreme Court of Wisconsin in the late case of *Cribben* v. *Ellis*, 69 Wis., 337, (34 N. W. Rep., 154). The

Court on a state of facts nearly identical with the facts in this case, citing the cases in 17 N. Y, 478; 40 *id*, 470; 93 *id*, 377–379; 39 Mich., 565; hold, where the terms of a voluntary assignment are so broad and general as to transfer to the assignee all the property of the assignor except his exemptions, a failure to attach to the assignment the schedule referred to therein as being annexed and as more particularly describing the property conveyed, does not invalidate the assignment, and the Court goes to the root of the matter as follows:

> "The assignment is not an assignment of the property mentioned in the schedule, but is an assignment of all the assignor's property, and for a more particular description of it, refers to the schedule attached. In such cases the courts uniformly hold that the schedule *if attached* does not restrict or limit the general words of the assignment and that all the property of the assignor passes though not mentioned in the schedule."

In Burrill on Assignments, 3d Ed., p. 177, the author says on this subject, the general rule appears to be that the omission to annex the usual schedule is not any reason for avoiding the assignment. An examination shows that it is so held in the courts of last resort of N. Y., N. H., Mass., Conn., Mo , Miss., Ala., Mich., Va., Ky., Col., Iowa, Texas, Wis., and by this Court in 17 Howard, 157, and 7 Peters, 614, *supra*

We are met with but one case having a like state of facts that seems to hold the views contended for by defendants, *to wit*: *Mim* v. *Armstrong*, 31, Md., 87.

There are a few cases that will be cited, but the facts do not fit the case we have here.

II.

As we have said partial assignments are permissible under the Common law in Iowa; but a partial assignment is a rare thing nowadays anywhere. They are contrary to our system, spirit, and policy. The Courts are not troubled with such assignments. Have never heard of one in the Courts of Iowa. Under the common law they are often made where the obligations are large and the debtor wants to favor a special creditor. A party might have land and personal property, and make a general assignment of either for the benefit of all his creditors. There can be no pretense, that by any fair construction the assignment in this case was intended to be partial. The cases cited *supra* we think conclusively dispels any such pretense.

Burrill on Assignments, 3rd, 186, shows that partial assignments are rare in commercial usage.

III.

As to the construction of the assignment in question. The rule, as laid down in the cases we have quoted *supra*, holding that the reference "to the schedule by no means indicates an intention to qualify or limit the broad and comprehensive language previously used * * * * * does not warrant the inference that it was intended that if any portion of the property of the assignor should be omitted, * * * that the title to such property should not pass to the assignee," would seem to be conclusive, and to reach any other construction, we submit that language has got to be strained in order to do away with the rules as pointed out *supra* that have received the sanction of so many courts.

In *Coyne* v. *Weaver*, 84 N. Y., 390, an assignment case in which it was sought to have the deed declared void. The Court in an interesting and elaborate opinion in giving a construction, say "two rules should guide us to a proper re-

sult. The meaning and intention of the assignor is to be gathered from the whole instrument, and where two different constructions are possible, that is to be chosen which upholds and does not destroy the instrument."

The above is the quaint old rule of Lord Coke (*Coke's Lstt*, 42), and see on same rule

Burrill on Assign, 4th Ed. p. 456;
Barney v. *Miller*, 18 Iowa, 460.

The actual meaning of the parties is to be sought, and in arriving at this the subject matter and purpose of the parties must be considered,

Jacobs v. *Jacobs*, 42 *Iowa*, 600,

and all parts must be weighed and the intention found, and, by the purpose to be effectuated,

McCraney v. *Griffin*, 13 *Iowa*, 331,

and to reach the purpose intended by the assignor, reference must be had to the assignment laws of Iowa.

Burrill Assignments, 4th Ed., Sec. 135.

The construction given to this assignment by the parties to it will not be overlooked by the Court; and to this end, their acts when *bona fide* will have very great weight in case of doubt.

This Court decided in *Edward's Lessee* v. *Darby*, 12 Wheat, 206, 211, that

> "In the construction of a doubtful and ambiguous law the contemporaneous construction of those called upon to act under the law and were appointed to carry its provisions into effect, is entitled to very great respect."

The same rule is announced in *United States* v. *The State Bank, Etc.*, 6 Peters, 34 40.

The rule in 12 Wheat, 211, has been adhered to in the following cases:

U. S. v. *Johnston*, 124 U. S., 236, 253.
U. S. v. *Moore*, 95 U S., 760, 763.
Brown v. *U. S.*, 113 U. S., 568, 571.
U. S. v. *Hill*, 120 U. S.. 169, 180.
Smith v. *Fiske*, 23 Wall, 374, 382.

Many other cases in this Court could be cited holding the same rule.

From the foregoing authorities it is made evident that the trial Judge was led into error by *misreading* the assignment. The construction given was a forced one in its terms, and really made an *assignment never intended by the assignor.* The interpretation of the trial Judge when aided by the contemporaneous facts, as he was, leads to a commercial usage, (aided by the forms of law) wrong and unjust in its consequences, as must appear from the undisputed facts. Under the decision of the Court below three firms take all of the personalty in question, that should have gone *pro rata* to all creditors. Verily, "Where the law ends, injustice begins."

This Court in *Nash* v. *Towne*, 5 Wall, 589, 599, in construing a contract, say:

> "Courts in the construction of a contract look to the language employed, the subject-matter and the surrounding circumstances. They are never shut out from the same light which the parties enjoyed when the contract was executed, and, in that view, they are entitled to place themselves in the same situation as the parties who made the contract so as to view the circumstances as they viewed them and so to judge of the meaning of the words and of the correct application to the thing described."

And in *Chicago* v. *Selden*, 9 Wall, 50, 54, it is held that

"Where the language used by the parties to a contract is indefinite and ambiguous, and hence of doubtful construction, the practical interpretation of the parties themselves is entitled to great, if not controlling influence."

Third Point.

I.

The Court erred in charging the jury that the assignment was void because Lane, the assignor, executed a deed to his wife and a mortgage to some infants, on the 18th day of November, 1884, and charging that these conveyances and the assignment, as a matter of law, formed one and the same transaction.

On this point the Court, after charging that the assignment did not convey the goods in question, proceeded to charge among other things as follows, to which the plaintiff then and there duly excepted (Rec., pp. 44–45 and 46).

"If, however, I am wrong in this ruling and it should be held that this instrument does convey the title of the goods to the plaintiff, as assignee, or, in other words, if this instrument is to be held to be a general assignment, then another question would arise, and as it has been fully presented by the evidence I deem it my duty to rule thereon, in order that all the questions material to the parties may be presented to the appellate court.

Par. 2. The statute of Iowa regulating general assignments for the benefit of creditors provides that no general assignment of property by an insolvent debtor or the contemplation of insolvency for the benefit of creditors shall be valid unless it be made for the benefit of all his creditors in proportion to the amount of their respective claims.

* * * * * * * *

Under the undisputed facts in this case it is clear that on

the 18th of November, before the execution of the deed and mortgage, Lane knew that he must take some action in regard to the disposition of his property or else his creditors would resort to the proper legal remedies for reaching the same. He certainly had in contemplation the idea of making an assignment on the morning of the 18th, and there is nothing to show that his idea was ever abandoned. The assignment was in fact executed, and its execution and recording are so intimately connected with the execution and recording of the deed and mortgage to the wife and wards as to form a part of the general disposition of the debtor's property, which was effectuated by giving the preferences to part of his creditors and executing a general assignment for the benefit of the remainder. This being so, the assignment is void and conveyed no right in the goods in question to the plaintiff, and upon this ground he cannot recover in this case; and your verdict must therefore be for defendants."

Plaintiff excepts to the whole charge.

There was no proof in the case upon which the Court could base a charge *that as a matter of law*, the deeds and mortgages formed parts of one and the same transaction.

The evidence as to the transactions now in question is found at length on pages 33 to 37 inclusive, of the Record.

As appears from the evidence Lane honestly owed his wife money. On the 13th of November, 1884, Carson, Pirie & Co., of Chicago, commenced an action and served the notice on Mrs. Lane and she, woman-like, at once left the farm and proceeded to the store at New Albin and demanded security, which, under the laws of Iowa, she had the right to do (Rec., p. 35).

The evidence conclusively shows that Lane owed his wife 4,000 dollars and he agreed to give her the conveyance Nov. 14, (Rec., p. 35). Defendants admit the indebtedness to

her, and admit that she demanded security on the 14th day of November, 1884, (Record, p. 42).

Lane was guardian of some minors and had received and used their money in the sum of 2,500 dollars.

On the 18th of November, 1884, Lane made the mortgage to secure the minors for which he was guardian. On the same day he made the deed to his wife to secure her the money he owed her. The land he mortgaged and deeded on the 18th of November, was already mortgaged for 5,000 dollars (Record, p. 35).

On cross-examination Mr. Lane testified as follows (Record, p. 35):

> Q. Now then, at the time you executed these deeds or mortgages, did you have any intention of making a general assignment of your property?
>
> A. No, sir. I first thought of it on the 19th of November, about noon.
>
> Q. Now, what property at the time you made the assignment did you have that was not incumbered, if any?
>
> A. I had a store and real estate that I turned over to the assignee. I had book accounts. The property, that property that I turned over to my assignee, was not incumbered."

And on page 36, Record, Mr. Lane proves that when he made the deed and mortgages in question and turned out the notes to his creditors, that he did not have in contemplation the making of a general assignment or any intention to prefer creditors and then assign. (On Rec., p. 36, as follows:)

> "Q. How does it come that you carried this deed and mortgage of your wife to the Recorder's; couldn't she record it?

A. The reason was my wife gave it to me to be recorded. I was the proper party to carry it there.

Q. Was the recording of this deed or mortgage any part of the transaction of the execution and recording of your assignment so far as your interest was concerned?

A. No, sir. Had nothing to do with it.

* * * * * * * *

I delivered these deeds to my wife the 19th day of November in the morning, and she gave them to me to take to the recorder's the same day" (Rec., p. 37).

Mr. Hurd, an attorney for defendants, testified (Rec., p. 37) that he had a conversation with Mr. Lane on the 17th or 18th of November and that Lane said he had been thinking of making an assignment, and that he was discouraged as to his business. Mr. Lane, however, refused to secure the claims the attorney was pushing.

In rebuttal Mr. Lane testified (Rec. p. 41) that he determined to make a general assignment on the 19th of November after nine o'clock in the morning.

On this *uncontradicted* evidence, proving that when the deed and mortgage was made and when the notes were paid over to creditors, Mr. Lane *had not determined upon making the assignment in question.*

Here we have shown a direct conflict, a pure question of fact, and one it was for the jury to pass upon. The assignment does not mention the deed and mortgages hence, *per se* the Court could not declare it void as a matter of law. It was for the jury, and not the Court, to say whether the assignment, deed and mortgage constituted but one transaction.

In *Morver* v. *Hanford*, 6 *Minn.*, 535, (*Gilfillan* Ed. 6 *Minn.*, 372), a case in which there were conveyances and

an assignment, and the trial Court holding as *a matter of law*, that the transaction being but one act was void. In reversing the case the Court says, at page 381, quoting:

> "But the Court proceeded further to charge that if the jury find that the several deeds of conveyance specified in the complaint, and the deed of assignment in the evidence, were in process of preparation at the same time and executed upon the same day, that then the whole constitute but one act, and are part and parcel of the same transaction
> * * * * * * * * * * *
> We think the Judge was clearly in error, in the charge last above quoted. There is no conclusion of law from the facts above stated, that the deeds were all one act and part of the same transaction. That was a question of fact solely for the jury, and it was error for the Court to take it from their consideration."

In the Answer (Rec., p. 9) practical fraud is alleged. It is a settled rule that in an action at law fraud is never presumed, but must always be found as a fact from the evidence.

In *Mass* v. *Riddle*, 5 Cranch, 351, Marshall, C. J.:

> "Fraud consists in intention, and that intention is a fact which ought to have been averred, for it is the gist of the plea and would have been traversable."

> "It is the rule in courts of law and courts of equity, that fraud is not to be presumed; but must be established by proofs" (1st Story, Eq., Jur., Sec. 190). (Bigelow Law of Fraud, pp. 137–139)

In *Seward* v. *Jackson ex. dem.*, 8 Cow., 406, the question of *fraud* in a conveyance was before the Court of Errors. Following this Court in the case of *Hinds, Lessee* v. *Longworth*,

11 Wheat, 213, *Spencer*, referring to the *Hinds case supra*, says: (p. 434)

> "After all the contradictions of the cases in England and in this country, in which we find the sages of the law arrayed against each other, it is consolatory to discover a spot of ground reared by the talents and learning of the highest American court on which we may safely and firmly rest."

It is a decision which meets directly the position of the plaintiff below, and overthrows it; for if, "the want of a valuable consideration, is only a badge of fraud, presumptive, and not conclusive evidence of it," *then the jury must pass upon it*.

Proceedieg on the question of *fraud in law* and fraud in fact, the Court on page 435 say:

> "Strictly speaking, there is no such thing as fraud in law; fraud or no fraud is, and ever must be a fact: the evidence of it may be so strong as to be conclusive, but still it is evidence and as such must be submitted to a jury. No court can draw it against the finding of a jury."

It is held in

Dygert v. *Remenschnider*, 32 N. Y., 629;
Holden v. *Burnham*, 63 *id*, 74;
Babcock v. *Eckler*, 24 *id*, 623;

> "That a voluntary conveyance is not *per se* fraudulent as to creditors; *whether it be fraudulent, is a question of fact for the jury.*

Burrill on Assignments, Sec. 340, 4th Ed., quoting: "It is a settled rule of law that fraud is never to be presumed, but must always be proved."

The same rule is held in *Green* v. *Banks*, 24 Tex., 508..

In *Sperry* v. *Etheridge*, 63 *Iowa*, 543, a case of several conveyances in which it was claimed that they were fraudulent and void on the ground that the making of *all* the conveyances constituted but one transaction, and amounted to a general assignment, and was void because preference was given. In deciding the case Beck, Judge, says on Page 548:

* * * * * * * *

"We think, then that the Circuit Court correctly held that the mortgages were not fraudulent in law."

"We think, however, that the Circuit Court erred in refusing to submit to the jury the question whether the mortgages were fraudulent in fact. It cannot be said that there was no evidence tending to prove that they were executed with intent to defraud or delay other creditors. It is said in 11 Iowa, 435, 'whether a chattel mortgage where the mortgagor holds possession and deals with the mortgaged property as his own. is fraudulent or not, is a question of fact for the jury and not one of law for the Court.'"

* * * * * * *

"The Court is justified in taking a case from the jury only when there is an entire absence of evidence tending to establish the claim or defense which is set up in the pleadings."

In *Jewel* v. *Knight*, 123 U. S., 426, it is held that whether a sale and delivery of a debtor's stock of goods, by way of preference of a *bona fide* creditor, is fraudulent against other creditors involves a question of fact depending upon all the circumstances, and cannot be referred to this Court by certificate of division of opinion.

The same rule is held in *Smith* v. *Croft*, 123 U. S., 436.

In *Warner* v. *Norton*, 20 How, 448 (2 Miller, 520), a case involving the *bona fides* of a sale of property, and it was held that

> "Whether such a sale was fraudulent or not is a question for the jury, under all the circumstances; and if it was made to hinder and delay creditors, they must so find."

And Mr. Justice McLean, on page 461, (524) after citing English and American cases, says:

> "The tendency has been, in England and the United States, to consider the question of fraud as a fact for the jury under the instruction of the Court."

In *Greenleaf* v. *Birth*, 9 Peters, 292, 299, it is held that

> "It is the province of the jury to weigh and decide on the sufficiency of the evidence * * * and the Court legally give any instruction which shall take from the jury the right of weighing the evidence and determining what effect it shall have."

The above rule has again and again been announced:

Washington R'y Co. v. *McDade*, 135 U. S., 554.
Dunlap v. *R'y Co.*, 130 U. S., 649.
Kane v. *R'y Co.*, 128 U. S., 91.
Phoenix In. Co. v. *Doster*, 106 U. S , 30, 32.
Spring Co. v. *Edgar*, 99 U. S., 656.

II.

The evidence proves that on the 14th day of November, 1884, Mrs. Lane demanded, and on the same day Mr. Lane agreed to give her security.

The mortgage to the infants and the deed to Mrs. Lane

were executed and acknowledged on the 18th of November, 1884 (Rec. 33). The deed to Mrs. Lane was delivered on the morning of the 19th (Rec. 37).

The assignment was executed and delivered on the 20th of November, 1884.

These documents were all filed for record on the 20th of November.

From the evidence it clearly appears that Mr. Lane after securing his wife, and wards, had a good many thousands of dollars worth of property that passed to his assignee, (enough, had he been let alone, to have paid all the creditors, let us believe).

The Courts of last resort of this country have over and again held that transactions such as here set out, *do not constitute one and the same act, and form parts of one transaction.*

This Court has held in *Jewell* v. *Knight*, 123 U. S., 426, 434;

> "that a debtor may lawfully give a preference to one of the creditors, if he does not thereby intend to defraud the others; and a sale and delivery of goods in satisfaction of an honest debt, cannot be avoided by other creditors, unless made and received with intent in fact, to defraud them."

Many cases are cited by the Court on the same point. And a husband may secure his wife, for a *bona fide* debt, in preference to other creditors;

Bean v. *Patterson*, 122 U. S., 496, 500;

> "And among creditors equally meritorious, a debtor may conscientiously prefer one to another; and it can make no difference that the preferred creditor is his wife."

Magniac v. *Thompson*, 7 Peters, 348; (10th Curtis, Ed. U. S. Rep., 513, 519.)

Smith v. *Croft*, 123 U. S , 436.

Medsker v. *Bonebroke*, 108 U. S., 66.

Tompkins v. *Wheeler*, 16 Peters, 106; (14 Curtis, 202).

It is not a fraud in the eyes of the law for a husband to prefer his wife and to transfer his property to her in satisfaction of his debt;

Sands v. *Pierson*, 61 Iowa, 702;

And a wife may loan money to her husband and take security therefor;

Inre Alexander, 37 Iowa, 454;
Doyle v. *McGune et. ux.*, 38 *id*, 410;
Jones v. *Brandt*, 59 Iowa, 338, 346.

In *Lampson et. al.* v. *Arnold*, 19 Iowa, 479, 484—5, it is held that

> "It is competent for one debtor to pay a part of his creditors in full; to secure others by deed of trust or mortgage on his property; to make a partial assignment of still other property for the benefit of certain other creditors, with or without preferences, and afterward make a *general assignment* of the remainder of his property for the benefit of all *pro rata*."

In same case it is held that

> "A conveyance of real estate to one creditor in payment or security of his debt, was executed by the debtor at the same time he executed a general assignment for the benefit of his creditors, does not make the two conveyances parts of but one transaction."

This case again approved in *Lyon* v. *McIlvaine*, 24 Iowa, 9.

In *Perry et. al.* v. *Vezina et. al.*, 63 Iowa, 25, it is decided where one mortgaged certain of his property, and *three hours* afterward made a general assignment for the benefit of his creditors (he not contemplating the assignment when mortgage made) *cannot be held to be void as being one transaction.*

In *Farwell* v. *Jones*, 63 Iowa, 316, a case quite similar to the one now in question, where a debtor, on the 28th of Feb., 1882, in the forenoon of that day, made three chattel mortgages to different parties upon all his goods, notes, etc. The mortgages were all filed for record within a few minutes of each other, the last being at 12:50 p. m. Afterwards on the same day the debtor executed a general assignment of the *same* property subject to the chattel mortgages. The assignment included all the property of the debtor not exempt, and was filed for record at 3:55 of the same day. It was claimed that the mortgages and assignment altogether constituted but one transaction and hence was void. The Court, on evidence much stronger in favor of the creditors than in this case *held* that the evidence did not show that all the instruments were parts of the same transaction, and upheld the assignment.

In *Gage & Co.* v. *Parry, Assignee*, 69 Iowa, 605, an assignment case in which several mortgages were made at the same time, and within *an hour* after, the general assignment was executed. It was claimed that all the instruments constituted but one transaction and was void because a preference was given. The Court sustained the assignment and held the transactions were not one and the same. The Supreme Court of Iowa rule the same way in

Aulman v. *Aulman*, 71 Iowa, 124;
The Sou White Lead Co. v *Haas et. al.*, 73 *id*, 404;
Garrett v. *The Burlington Plow Co.*, 70 *id*, 703;
Loomis v. *Griffin*, 78 *id*, 485, approving
Meeker v. *Sanders*, 6 Iowa, 68, the first case in Iowa cited *supra*;
Bump on Fraudulent Con, p. 365, 220.

Cases from other states holding the rule of the Iowa Courts are numerous. It would seem to be cumulative to cite them.

Cases in 8th Iowa, 96; in 13th *id*, 551; and in 52 *id*, 518 will be cited by defendant as holding a rule adverse to what we claim. As to the case in 8th Iowa, the Supreme Court, in 19 Iowa, 489, say: "The case is exceptional rather than at variance," and such is the case of the 13th Iowa, 551. The case in 52 Iowa, 518, was disposed of on a demurrer and is distinguished from 19 Iowa, 479, by the Court.

The case in 8th and 52 Iowa are again reviewed in *Aulman* v. *Aulman*, 71 Iowa, 126, and that they are exceptional rather than at variance is again pointed out.

III.

Defendants seem to claim that it is a badge of fraud, because Mr. Lane held possession of the mortgage, executed in favor of his infant wards, from the 18th to the 20th of November; and a badge of fraud because his wife intrusted to him the deed he executed to her in order that he might deliver the same to the County Recorder for record. Such claim will be specious rather than solid. The deed and mortgage were made on the 18th day of November, 1884, and the assignment on the 20th.

The making of the deed and mortgage by Lane operated at once to pass the title to the grantees; and as to the

mortgage Lane could well have the physical possession thereo as the guardian of the infants. His holding the physical possession would be an actual delivery to the infants.

Constructive or symbolical delivery is allowed in many cases. Thus the assignment of a vessel at sea, a bill of sale will pass the the title; a sale of goods on board of a ship at sea by an assignment of the bill of lading and invoice will pass the title, and in *De Wolf* v. *Harris*, 4th *Mason*, Rep. 515, it is held that an endorsement of the bill of lading was not indispensable to pass title.

Again, whether there was a delivery is a question of fact. No particular formality need be observed, and the intent to deliver may be manifested by both acts and words.

Lane says he made the mortgage to secure his wards and supposed he was the proper one to hold and file the same for record. May we ask, who else could have taken it?

Judge Bouvier in 1st Inst., 142, says the guardian is to take care of his ward, and to represent him in all civil acts, and in all actions.

This Court has said in *Tompkins* v. *Wheeler*, 16 *Pet.*, 106, (14 *Curtis*, 202,) that "a deed left with the County Clerk to be recorded, and held by him for the grantee, is in law delivered to the grantee."

Under the authorities the delivery was complete.

Tied on Real Prop , Sec. 813.
23 *Cent. Law Jour.*, 8, Leading Article.
Foley v. *Howard*, 8th Iowa, 60–61 and cases cited.

However, having shown that the assignment is valid, if it should be held that there was no delivery until after Lane filed it for record, then it would be of no validity as against Bock, the assignee, because the assignment was made hours before the filing of the mortgage for record.

Fourth Point.

The Court erred in refusing to allow the case to be argued to the jury and in directing a verdict for the defendant.

Fifth Point.

The Court erred in its second paragraph of the charge in directing the jury to find for the defendant.

Sixth Point.

The Court erred in over-ruling plaintiff's motion for a new trial because the verdict was contrary to the evidence and the law of the case (Rec., p. 15).

Final Point.

The judgment below should be reversed and the case remanded for a new trial.

Mr. Lane intended that all his porperty should be distributed under the assignment. The laws of Iowa have been ignored by the attaching creditors. The laws of Iowa should be upheld, and no *brutem fulmen*, such as the facts and evidence of this case disclose, on the part of the attaching creditors, their officers and attorneys, should be allowed to obtain.

H. B. FOUKE,
D. E. LYON,
Of Counsel.

March, 1891.

Office Supreme Court U. S.
FILED.
MAR 31 1891
JAMES H. MCKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

NO. 285.

W. O. BOCK, ASSIGNEE OF H. P. LANE, PLAINTIFF IN ERROR,

vs.

GEORGE D. PERKINS, W. H. THRIFT, AND TIMOTHY M. HOPKINS, DEFENDANTS IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF IOWA.

REPLY BY PLAINTIFF TO THE BRIEF AND POINTS MADE BY DEFENDANTS IN ERROR.

H. B. FOUKE,
D. E. LYON,
Of Counsel for Plaintiff.

I.

The defendant in error in his first point to sustain the ruling of the trial court, that the goods in question did not pass under the assignment, cites several cases to which we briefly reply. The case of *Mim vs. Armstrong*, 31 Md., 87, has some facts similar to the facts in the case at bar, and the Court decided that under the facts of the case the general words of the assignment were limited by the reference to the schedule. This case is contrary to the great weight of authority as held by nearly all the courts of the country, many of which are cited in our brief.

The case of *Guerin vs. Hunt et al*, 6 Minn., 375, was not a general assignment of all the property *of the members* of a firm, but, as the Court found, was an assignment of the parties *in their associate capacity*. This case is decided on the doctrine of *Wilkes vs. Ferris*, 5 John, 335, which case was in *Platt vs. Lott*, 17 N. Y., 478, examined and distinguished, and also is not followed in 40 N. Y. 470, 93 N. Y. 374, 15 Barb. 56, 28 Barb. 293, 20 How. Pr. 289, 2 Paige Ch. 311; nor is it followed by any case we cite in our second point.

Driscoll vs. Fiske, 21 Pick., 503, cited by defendant, was where a firm assigned, having special reference to *joint property*. The Court simply decides that the property of an *individual* member did not pass, either by the general clause or by the schedule.

The case of *McAlpine vs. Foley*, 25 N. W. Rep., 452, and the other cases cited by defendant, are not in point, in fact, or law.

II.

The second point made by the defendant in error we have shown, in the THIRD POINT in brief for plaintiff in error, not to be a sound exposition of the law, and that the Court erred in holding that the assignment, deed and mortgage formed parts of one transaction.

III.

The third point of the brief of defendants is to us inexplicable. The Statute of Iowa, Sec. 4195, is quoted as protecting the Sheriff or Marshal in the levy of an attachment upon the wrong goods until notice of the claim of ownership of such goods is served by the claimant upon the officer.

The record shows that such notice was served on the 17th day of December, 1884, upon all of the defendants, and that service of such notice was accepted by them. (See Record p. 27.)

The record further shows that this suit was not commenced until the 18th day of December, 1884, for the January term, A. D., 1885. (See Record p. 3.)

It is certainly not within the contemplation of counsel to claim that the trespass, if any, dates only from the time of the service of such notice. If it were, any case of trespass by an officer

in wrongfully levying upon the goods of another, to satisfy a writ of attachment against the defendant, would be lost to the party aggrieved.

The Statute appears to be for the benefit of the officer to this extent: If he makes a wrong levy and receives notice thereof, he may return the goods, unless he is indemnified by the attachment creditor. If he does not return them, the presumption would be indulged that he had been so indemnified, and any loss he may sustain by reason of his trespass, will be made good to him by the parties who have been instrumental in directing his wrongful act. But the trespass, of course, relates back to the time it was committed, and makes him liable for the damage done at that time. But the Statute nowhere limits the time within which such notice shall be given after seizure. If delayed until after the property, in the usual and orderly course of law, had been disposed of by the officer and the proceeds had passed out of his hands, this might exonerate him, if Statutes of this kind could exonerate. But no such question arises here. Full effect can be given the provisions of the Statute, and still the plaintiff have a right to recover, if he is, in fact, holding or claiming to hold by the better title.

IV.

The fourth point made by defendant in error, we submit is not well taken.

This is an action at law in trespass against all of the defendants, in which we claim in our *ad damnum* to the petition the sum of Ten Thousand Dollars.

Upon the trial the Court directed the jury to find for defendant upon two questions deemed by the Court the controlling questions in the case. These were: 1st. Whether the assignment included the personal property in question, and, 2d, whether even if it did, the assignment was not part of a transfer with preferences, and under the Statute void. The verdict under this direction was for all of the defendants. And the only questions to try arise out of this direction.

Now, the only criterion by which to determine the jurisdiction, there having been judgment for the defendants, is how much does the plaintiff in his declaration or petition sue for? And the uniform current of decision in this Court has been that this question is to be conclusively decided by the amount claimed in the declaration or petition. Had there been judgment in favor of plaintiff against defendants in different amounts, then, possibly, the question suggested might arise. But in no case that we have been able to find in a necessarily hurried examination, was the question determined except in suits in equity, where the decrees were for amounts less than the jurisdictional amounts, against each of certain defendants.

Here in this law suit, where no issue of the kind suggested could possibly arise or be determined, the Court will not look be-

yond the amount claimed in the petition to ascertain its jurisdiction. When the case shall be presented to a jury and the question raised and presented, and the jury shall determine whether there is one joint trespass or several, separate and individual, it will be time enough to consider the proposition presented by defendants in error.

This, of course, is as to the jurisdictional amount necessary to enable this Court to retain this case. The question as to whether the case is removable presents entirely different features, and we still insist that there is no question of Federal law involved in the controversy as to whether defendants took the property in dispute, and as to whether it belonged to the plaintiff in error.

H. B. FOUKE,
D. E. LYON,
Of Counsel.

MAR 28 1891
JAMES H. MCKENNEY

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

NO. 285.

W. O. BOCK, ASSIGNEE OF H. P. LANE, PLAINTIFF IN ERROR.

vs.

GEORGE D. PERKINS, W. H. THRIFT AND TIMOTHY M. HOPKINS.

BRIEF FOR DEFENDANTS IN ERROR.

DAVID B. HENDERSON,
LOUIS G. HURD,
FRANCIS B. DANIELS,
Of Counsel for Defendants in Error.

SUPREME COURT OF THE UNITED STATES.

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF IOWA.

BRIEF FOR DEFENDANTS IN ERROR.

I.

The deputies of the United States marshal, having in their hands writs of attachment against one Lane, seized goods which plaintiff Bock alleges to have been his. Hence this action against the marshal and his deputies for the value of the goods.

The Circuit Court instructed the jury to find for defendants. There were verdict and judgment accordingly, and Bock brings the case here by writ of error. We represent the defendants in error, who were defendants below.

Bock claims under a deed which antedated the seizure. The deed, (Record Folios 57-60), executed by Lane as party of the first part, purports to convey to Bock—

"All the lands and all the personal property of every name and nature whatsoever of the said party of the first part, more particularly enumerated and described in the schedule hereto annexed, marked Schedule 'A', or intended so to be."

Schedule A (Fols. 60-62), which was annexed to the deed, enumerates and describes divers items of real and personal property, but does not enumerate or describe the goods in question.

The first inquiry is whether these goods passed by the deed.

Plaintiff contends that they did, by virtue of the earlier general words of the deed—"all the lands and all the personal property of "every name and nature whatsoever of the said party of the first "part."

Defendants contend that the general words, just quoted, are not the entire language of the deed on this point, but that the deed reads: "All the lands and all the personal property of every name "and nature whatsoever of the said party of the first part, more "particularly enumerated and described in the schedule hereto an-"nexed, marked Schedule 'A', or intended so to be," and hence that the goods did not pass by the deed.

Defendants also support their contention by the following decided cases:

Mims vs. Armstrong et al., 31 Md., 87.

Guerin vs. Hunt et al., 6 Minn., 375.

Wilkes vs. Ferris, 5 Johns., 335.

Driscoll vs. Fiske, 21 Pick., 503.

Wood vs. Rowcliffe, 5 English Law and Equity Reports, 471, 20 Law J. Rep. (N. S.) Exch. 285.

McAlpine vs. Foley et al., 25 Northwestern Reporter, 452 (Minnesota.)

Barton vs. Dawes, 19 Law J. Rep. (N. S.) C. P. 302.

Griffithes vs. Penson, 25 Law J. Rep., 552.

In *Mims vs. Armstrong et al.*, 31 Md., 87, there was an assignment for the benefit of creditors, which recited that the assignor "is indebted to divers persons in divers sums of money, which, by reason of sundry losses and misfortunes, he has become unable to pay in full, and is desirous of providing for the payment thereof, as far as he can, in a just and equitable manner, by assignment of all his property and effects for the purpose."

And in the granting clause the property is described as "all and singular his goods, chattels, promissory notes, debts, wares, merchandise, securities, and vouchers, for and affecting the payment of money, claims, demands, choses in action, and property of every name and nature whatever, of and belonging to him, and which are more particularly and fully enumerated in the schedule hereto annexed, marked Schedule 'A.'

Sometime after the assignment, Armstrong and others, creditors of the assignor, discovered certain money which he had at the date

of the assignment, but which was not embraced in the annexed schedule, and they compelled him to devote the money to the payment of their claims.

Then this action was brought by the assignee, to recover from Armstrong et al., the money so received by them, on the ground that it formed part of the assets assigned by the deed of trust.

Held, that the money in question did not pass by the deed.

The court says (pp. 94, 95):

"It is now settled, by all the authorities upon the subject, that a schedule, executed and referred to as in this case, forms part of the deed; and that being so, the well-established rule of interpretation is applicable, that where general words are followed by a special clause, the latter will restrain and limit their operation. It is a general rule, regarded as well established even before the time of Lord Bacon, that where the instrument contains, in the first instance, a good and certain description of the thing granted, a subsequent mistake as to names, quantity, location, or some mere incident, will not be allowed to vitiate the grant. The subsequent mistaken description will be rejected upon the principle of *falsa demonstratio non nocet.* But where the subject of the grant is first described *generally*, and afterwards a particular description is added, that will, if it can be reconciled to what precedes it, restrain and limit the operation of the more general words of description. Shep. Touch., 88; Com. Dig., 'Parols' (A, 7, 8,) or, as the rule is stated by Lord Ellenborough, in *Conolly vs. Vernon*, 5 East, 78, "A circumstance *mistaken and false* will not frustrate *the grant of particulars sufficiently once ascertained.* But here (in that case) the words first used are *general* words, not descriptive of particular things; and, according to Lord Hardwicke, in *Gascoigne vs. Barker*, 3 Atk., 9, 'where a man does not make a certain definitive description, it is very difficult for courts of justice not to construe subsequent restrictive words as explanatory of the former.' And this distinction is to be found in *Dyer*, 50, *b*," says Lord Ellenborough.

"In the grant before us the general descriptive words employed would certainly be sufficient, in the absence of any restrictive clause, to pass all the debtor's property; but we must suppose that the grantor had a purpose in the more particular description which he thought proper to give in the schedule, and that that purpose was what he declares it to be, a more particular and full description of the property conveyed. To withhold this meaning from the words of reference to the schedule is to deny to them all import whatever; and that is justified by no rule of construction.

"If, instead of referring to the schedule for a particular description of the property, the grantor had followed the general description with such words, as namely, that is to say, or, as follows,

and set out in the body of the assignment itself the items enumerated in the schedule, there could hardly have been a doubt but that the preceding general words of description would have been restrained and confined to the subsequent enumeration. And if that be so, how does the fact that the schedule, instead of being incorporated in the body of the deed, is on a separate sheet of paper annexed thereto, change in any manner the application of the principle? For the schedule being part of the deed, we should read it as if inserted in the body of that instrument. And, having reference to the actual intent of the grantor, as a sum of money was among the things enumerated in the schedule, though not the money sued for, it would be difficult to conclude, especially if we consider the conduct of the party, that he had any design of passing to his assignee any other money than that mentioned."

Guerin vs. Hunt et al., 6 Minn., 375, was an action by the assignee against a sheriff for seizing assigned chattels, on a writ of attachment against the assignors, members of a partnership. The sheriff, justified on the theory that the assignment was void, offering evidence of certain conveyances by one of the parties of his individual property upon secret trust for himself. If the assignment was general, covering the individual property of the parties, the evidence was admissible. If, however, the assignment was only an assignment of the parties in their associate capacity, the evidence was not admissible.

The court says:

"In the beginning they (the assignors) described themselves as 'Louis Bartlett, Jr., and Firman Cazeau, copartners under name, style and firm of Bartlett & Cazeau of the first part.' They say they are indebted and desirous of making a fair and equitable distribution of their property and effects among their creditors. Then they sell and assign to the party of the second part, 'all and singular, the lands, tenements and hereditaments of said parties of the first part, situated, lying and being in the Territory of Minnesota, and all the goods, chattels, wares merchandise, bills, bonds, notes, book accounts, claims, demands, judgments, choses in action, evidences of debt and property of every nature and description of the said parties of the first part, of which said lands and property aforesaid a schedule will be hereto annexed, marked A, and also all the books of account of said parties of the first part, and all papers, documents and vouchers relating to their business dealings or property, * * * There is a schedule of the property intended to be transferred annexed, which enumerates the property specifically and contains no words of general import, indicating that any other than the specific property mentioned was designed to be passed. It is a general rule in the construction of assignments containing general words of transfer, such as all the debtors

property, that subsequent words of description, or a reference to a schedule as setting it forth specifically will operate to limit the general clause of transfer and nothing will pass that is not set forth or specified. Burrill 327, 244-5-6, and cases there cited. Nor does any presumption arise from such an assignment that it is a general one, Id. 244-5. *Wilkes vs. Ferris*, 5 Johns., 335. It was perfectly competent for these partners to make an assignment of their partnership property alone, reserving their individual estates which will be liable to seizure for their firm debts at any time; or they might have assigned their partnership property and put into the same instrument portions of their individual property without its being a general assignment or being subject to the rules applicable to such instruments. One of the partners did in fact put into the schedule the undivided one-half of the store in Faribault, which was the individual property of Bartlett. We think the assignment was not a general one, but was an assignment of the parties in their associate capacity."

In *Wilkes vs. Ferris*, 5 Johnson, 335, an assignment for creditors conveyed

"all the goods, property, wares, merchandises, chattels, vessels, debts, sum and sums of money, claims and demands, and effects, belonging to, and now due and owing to the said *Henry Cheriot*, or to which, and in which, he has any right, property, claim or demand, which said goods, wares, and merchandises, hereby granted and sold, are particularly described and enumerated in the schedule A, signed by the said *Henry Cheriot*, and to these presents annexed."

A creditor attached certain of the goods enumerated in the schedule and supported the attachment by the contention that the assignment was void, one of the elements of the contention being that (p. 339)

"though a schedule is referred to, yet if he possessed any article not contained in the schedule, the words of the assignment are broad enough to comprehend it."

The court held otherwise, saying (p. 345):

"This was not, in fact, a general assignment of *all Cheriot's* estate; for though the words, in one place, be general, yet the assignment immediately goes on to specify, by a reference to the schedules annexed, the specific articles of property assigned; and it, therefore, could operate only upon the articles specified; for, as the court said, in *Munro vs. Alaire* (2 Caines, 327), if a general clause be followed by special words, which accord with the general clause, the deed shall be construed according to the special matter."

Driscoll et al., vs. Fiske, 21 Pick., 503, was a suit against a dep-

uty sheriff to recover the value of certain furniture attached by him as the property of G. W. Light in a suit against Light & J. A. Stearns. The furniture was claimed by plaintiffs under an assignment previously made by Light & Stearns for the benefit of their creditors. By the assignment Light & Stearns assigned to plaintiffs,

"all their books, stock in trade, printing apparatus and machinery, books of account, book debts, notes and demands, and all other property of every name and nature, except such as is exempt from attachment, most of the same property being now at their place of business at No. 1 and 2, Cornhill, in said Boston, a schedule of which is annexed. * * *. And it is further agreed, that other and fuller schedules of the property hereby assigned shall be hereunto annexed, as soon as the same can be conveniently made."

The annexed schedule described other property, but did not describe the furniture in question. It was agreed that Light would testify, that when the assignment was making he intended to have the furniture covered by it, and so said to the scrivener, and asked the scrivener if the furniture was included and he said it was; and that an agent of the assignees took possession of the furniture by going into Light's house for that purpose. The court *held* that the evidence was not admissible, and that the furniture did not pass by the assignment. And, while the opinion lays stress upon the improbability that in this firm assignment the individual property was intended to be conveyed, though omitted from the schedule, yet the opinion uses these words:

"The conveyance of certain property specified, and of all other property of every name and nature except such as is exempt from attachment, might well be construed to mean all the property which the assignors had jointly or each of them had severally. * * * The general words are restrained by reference to the schedules which were annexed before the attachment was made. So that the assignment, independently of the parol evidence, cannot by fair construction be said to include the furniture of the individual assignors."

Wood vs. Rowcliffe, 5 English Law and Equity Reports, 471, 20 Law J. Rep. (N. S.) Exch. 285, was an action of trover for household goods. Defendant claimed under a bill of sale of

"all the household goods and furniture of every kind and description whatsoever in the said house, No. 2. Meadow Place, more particularly mentioned and set forth in an inventory or schedule of even date herewith."

All the goods and furniture, for the conversion of which the action was brought, were in the house, but some were not specified in the inventory.

Held, that the bill of sale operated upon such only of the goods as were specified in the inventory, *Alderson, B.*, remarking that to hold otherwise, the bill of sale must be read as if it were, "of "which some are more particularly mentioned in the inventory."

McAlpine vs. Foley et al., 25 Northwestern Reporter, 452 (Minnesota, 1885), was a case of an instrument describing
"all my entire possessions at Grand Rapids, including the certain household furniture and all paraphernalia thereunto belonging to said; also, six lots in No. 27; 12 lots in Block No. 5; also, one flatboat, one span of horses, one wagon, one tote sled, one pung."

Held, not to include a stock of liquors in a saloon kept by the vendor.

Barton vs. Dawes, 19 Law J. Reps. (N. S.) 302, was a case of a deed conveying the messuage and land called G farm, consisting of particulars specified on a schedule and delineated on a map drawn on the schedule.

Held, that a close not included in the map and schedule did not pass by the conveyance, though it had been occupied with the specified closes and treated as a part of G farm.

In *Griffithes vs. Penson*, 25 Law J. Rep., 552, a farm was conveyed by the description:
"all that messuage, etc., with the lands, etc., thereto belonging * * * now or late in the occupation of B., * * * which said lands, etc., are called, known and described by the several names and contain the several quantities by admeasurements following, that is to say."

And then followed a particular description, by names and admeasurements, of several closes.

Held, that the description of the several closes by name could not be rejected as *falsa demonstratio*, and consequently that three other closes, which had always been occupied by B., under the grantor as a part of the farm, did not pass under the grant.

The only cases to the contrary which seem to us worthy to be noticed are *Platt vs. Lott*, 17 N. Y., 478, and *Turner vs. Jaycox*, 40 N. Y., 470.

In *Platt vs. Lott*, 17 N. Y., 478, the recitals, the granting clause and a subsequent clause of the assignment pointed much more strongly to *all* the property of the assignor than the instrument at

bar, and the reference to the schedule was less significant, being preceded by a semi-colon and introduced by the words which we italicise, "*the same being* more fully and particularly enumerated and described in a schedule," etc.

This case of *Platt vs. Lott* is referred to in the opinion in the above cited case of *Mims vs. Armstrong et al.*, 31 Md., at p. 97, as follows:

"The case most relied on by the appellant's counsel, as supporting a contrary construction, is that of *Platt vs. Lott*, 17 N. Y. Rep., 478, where it was held that an assignment in trust, for the benefit of creditors, of all a debtor's property, which was therein stated to be more fully and particularly enumerated and described in a schedule annexed, passed property not mentioned in the schedule. But upon examination of that case, the grounds upon which the judgment proceeded do not appear to be consistent with previous decisions. It was conceded that the ordinary rule is as we have stated it; but, proceeding upon what was supposed to be the better evidence of the intent, the general and comprehensive words used in the grant, it was concluded that the office of the schedule, though made part of the deed, was only matter of convenience, and intended as a guide to the assignee, and, therefore, should not be allowed to qualify or limit the broader language previously used. This suggestion, with reference to the purpose of the schedule, has been apparently approved in some of the subsequent cases; but as such construction appears to us to be a manifest departure from an established rule of interpretation, we are not at liberty to adopt it."

In *Turner vs. Jaycox*, 40 N. Y., 470, the conveying clause expressly mentioned, among other things, "all the goods, chattles, merchandise."

The court says of the schedule, (pp. 472, 473):

"No allusion was made in it to the tangible personal property owned by the firm (the assignors). But that was not necessary for the purpose of transferring the title to that species of property to the assignee. The terms made use of in the body of the assignment were of so definite a character as clearly to indicate it to have been the intention of the assignors that this property should pass by the assignment. For the words, goods, chattels and merchandise, were entirely inapplicable to anything else that the assignment could by any possibility operate upon. Other appropriate words were made use of for the purpose of describing the real estate, debts, accounts, and other choses in action, and exhibiting it to be the intention of the assignors to grant and assign all of that property owned by them to the assignee. The words 'goods, chattels and merchandise' could have no pertinency to the sale or assignment of real estate and choses in action, and if they did not include the property in

controversy, they would be without any meaning or signification whatever in the assignment. * * * The terms used, which were neither apposite nor appropriate to the other property assigned, clearly evinced the intention that the goods and merchandise of the assignors should pass under them to the assignee."

It may be noted that *Holmes vs. Hubbard*, 60 N. Y., 183, expressly approves *Wilkes vs. Ferris*, 5 Johns., 335, above cited, and distinguishes *Platt vs. Lott*, 17 N. Y., 478, and *Turner vs. Jaycox*, 40 N. Y., 470, in such terms as to indicate that no principle can be deduced from them.

The case in *Holmes vs. Hubbard*, 60 N. Y., 183, was a bond conditioned that if the obligors should indemnify and save harmless the obligee

"from all and singular the debts and liabilities that may be existing against said copartnership, then the above obligation to be void, otherwise, to be and remain in full force and virtue. Liabilities as per schedule of indebtedness hereto attached."

Held, that a debt not mentioned in the schedule was not secured by the bond.

In *Emigrant, etc., Bank vs. Roche et al.*, 93 N. Y., at p. 378,—a case arising, however, upon facts wholly unlike those at bar,—the same court says:

"It is a rule for the construction of all written instruments conveying property, that if a general clause be followed by special words the instrument shall be construed according to the special matter; and in the application of this rule it is held that the general words of an assignment should be restricted by a subsequent clause referring to a schedule annexed for a more full description. (*Wilkes vs. Ferris*, 5 Johns., 35; *Holmes vs. Hubbard*, 60 N. Y., 183.)"

II.

The second question presented by the record is whether, regardless of the sufficiency or insufficiency of the deed, upon its face, to pass the title in these goods to plaintiff in error, it should not be held void under the Iowa statute prohibiting assignments with preferences.

That statute—Code (of 1873) Sec. 2115, Code of 1851, Sec. 977—is as follows:

"No general assignment of property by an insolvent, or in contemplation of insolvency, for the benefit of creditors shall be valid, unless it be made for the benefit of all his creditors in proportion to the amount of their respective claims."

The Supreme Court of Iowa, in construing this statute, holds that it is immaterial whether the preferences and the assignment are sought to be accomplished by a single instrument, or by several, and whether or not any of them be in form or terms a general assignment. *Burrows vs. Lehndorff*, 8 Iowa, 96. Thus, where an insolvent, contemplating a general assignment, first executes a mortgage to one or more of his creditors, and then executes a general assignment, the assignment is void and the property purporting to be conveyed by it, is subject to execution or attachment against the assignor. *Cole vs. Dealham*, 13 Iowa, 551. *Van Patten & Marks vs. Burr*, 52 Iowa, 518. And in such case the assignment is void, even though the mortgage, or one of several mortgages, be held good. *Van Patten & Marks vs. Burr*, 55 Iowa, 224. "The question is not whether these mortgages are "valid, but whether the assignment can be upheld." *Cole vs. Dealham*, 13 Iowa, 552-3.

That such a statute is not confined, in its reference, to preferences declared in the instrument of assignment itself, but extends to those effected by separate transactions, though the different instruments may not bear the same date, or be executed at the same point of time, or even though no one of the instruments may be, in form, a general assignment, is a common doctrine elsewhere as well as in Iowa. The statute is violated if at the time of making the preferences the debtor, being insolvent, contemplated an assignment.

White vs. Cotzhausen, 129 U. S., 329, and cases cited.
Preston vs. Spalding, 120 Ill., 208, and cases cited.
Miner vs. Hoyt, 66 Wis., 227, and cases cited.
Kellogg vs. Root, 23 Federal Reporter, 525 (Michigan).
Burrows vs. Lehndorff, 8 Iowa, 96
Cole vs. Dealham, 13 Iowa, 551
Van Patten & Marks vs. Burr, 52 Iowa, 518

In many of the states the preferences, only, are void, and the assignee is entitled to the whole estate, but in Iowa the effect of a preference is to render the assignment void, while the preference

may or may not be void, according to the circumstances of the relation of the preferred creditor to the transaction.

Cole vs. Dealham, 13 Iowa, 551

Van Patten & Marks vs. Burr, 52 Iowa, 518

Van Patteu & Marks vs. Burr, 55 Iowa, 224

That in the case at bar H. P. Lane gave preferences at a time when he was insolvent and when he contemplated making the assignment to plaintiff, seems to us to appear, undisputed, in the evidence.

This assignment was executed, acknowledged and recorded on November 20th, 1884, (Record Folios 57, 59, 65). It was executed at Lansing, (Fol. 38), which is perhaps fifteen miles from Waukon, the county seat. Lane, the assignor, and Bock, the assignee, drove together from Lansing to Waukon (Fols. 44, 55, 104, 105), Bock taking the assignment (Fols. 38, 48, 104, 105), and Lane taking two other instruments (Fols. 43, 90, 91, 104, 105), which he filed for record a few minutes before the assignment was filed (Fols. 43, 44, 91, 93, 65).

These two instruments, so recorded by Lane, were a deed from Lane to his wife, and a mortgage from Lane and wife to certain minors, named Hostet, of whom Lane was the guardian. Both were dated and acknowledged November 18th, 1884 (Fols. 90-94, 95, 98). The deed to the wife was given to secure an indebtedness to her (Fols. 91, 98, 99, 124, 126), and the mortgage to the Hostet minors was given to secure money he had received as their guardian (Fol. 98). He had delivered the deed to the wife on the 19th (Fol. 105), and she had given it to him to be recorded (Fol. 104). On November 18th Lane also assigned to a creditor named Hartley a mortgage executed by one Morgan (Fols. 91-94.)

On November 19th he gave security to Large & Amsden (Fol. 98), and to M. D. Wells & Co. (Fol. 124), and about the same time gave security to Anderson and Mehlhop (Fols. 96, 97, 100.)

During the month of November he was in a condition of insolvency (Fol. 97), and on November 13th was sued by Carson, Pirie, Scott & Co. (Fol. 99); on the 14th his wife demanded security (Fol. 125); and on the 17th or morning of 18th he said he was "thoroughly discouraged in regard to his business, and can't continue in this way any longer." (Fols. 108, 109, 126). He thought of an assignment on the morning of the 18th before the execution of the conveyances to his wife and the Hostet's (Fols. 105, 106),

and on the morning of the 18th counseled with an attorney for one of his creditors about making an assignment (Fols. 126, 106, 111).

Regarding the precise time when Lane's purpose to make the assignment became final, he testifies as follows, (Fol. 124:) "Q. When did you first conclude to make an assignment? A. On the morning of the 18th."

(Fol. 125): "Q. When did you determine to make a general assignment? A. On the 19th of Novenber, after 9 o'clock."

He informed the assignee before 10 o'clock in the morning of the 19th, and the schedules were prepared that day.

The facts which we have thus set forth, as detailed in uncontradicted evidence, are very fully recited by the trial judge (Shiras) in the charge to the jury (Fols. 136, 137, 138), and also by the circuit judge (Brewer), on page 126 of Federal Reporter, Vol. 28, in his opinion on the motion for new trial. *Bock, Assignee, Etc., vs. Perkins et al.*, 28 Fed. Rep., 123.

We have repeated them in order to give the court the references to the Folios of the Record.

It seems to us quite clear from this evidence, in which there was no dispute to submit to a jury, that the assignment was in contemplation at the time of the preferences to the wife, the Hostets, Hartley, Large & Amsden, and M. D. Wells & Co., and probably also the other preferred creditors.

If this was true with regard to a single one of the preferences it vitiates the assignment. It seems to us to be true as to each of the creditors named.

III.

At the time of the acts complained of there was in force in Iowa a statute in the following terms (McClain's Annoted Statutes of Iowa, Revised Edition of 1888, Vol. I., ¶ 4195):

"An officer is bound to levy an attachment on any personal property in the possession of, or that he has reason to believe belongs to, the defendant, or on which the plaintiff directs him to levy. But if after such levy he shall receive notice in writing under oath from some other person, his agent or attorney, that such property belongs to him, and stating the nature of his interest and the facts showing how he acquired such interest and for what consideration, such officer may release the property unless a bond is

given as provided in the next section. But such officer shall be protected from all liability by reason of such levy until he receives such written notice."

This statute is not unconstitutional, *Cheadle et al., vs. Guittar et al.*, 68 Iowa, 680.

The liability sought to be enforced in this action is one arising, if at all, before the service of the notice provided by the statute.

The alleged trespass, for which this action is brought, is laid in the petition, and in the evidence, as committed on or about the 26th day of November, 1884, when the goods were at New Albin, Iowa, whereas the notice, provided for by the statute, was not served until the 17th day of December, 1884, after the goods had been removed to Dubuque, Iowa, (Fols. 69, 70, 120), which is about one hundred miles from New Albin.

If the United States marshal is entitled to the same protection of this statute, as a sheriff of the state, there would seem to be no doubt that the marshal cannot be held in this action.

The following Sections of the Revised Statutes of the United States may be applicable to the inquiry:

SEC. 721. "The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

SEC. 788. "The marshals and their deputies shall have, in each State, the same powers, in executing the laws of the United States, as the sheriffs and their deputies in such State may have, by law, in executing the laws thereof."

SEC. 914. "The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such circuit or district courts are held, any rule of court to the contrary notwithstanding."

Where the statute last quoted uses the words, "modes of proceeding," the act of 1789 (1 St., 93, Sec. 2), used the words, "modes of process." But in 1792 the expression "modes of proceeding" was adopted, and it has been continued through the subsequent statutes.

1792, 1 St., 276, Sec. 2.
1828, 4 St., 279.
1842, 5 St., 499.
1872, 17 St., 197, Sec. 5.
R. S., Sec. 914.

These words have been repeatedly before this court for construction, and this court has held that they include the conduct of the marshal in serving a writ.

In *Wayman vs. Southard*, 10 Wheat., 1, at page 28, the court, speaking of the term "modes of process," said:

"It indicates the progressive course of the business from its commencement to its termination; and 'modes of process' may be considered as equivalent to modes or manner of proceeding."

Further on in the same opinion, (10 Wheat., at p. 32), referring to the term "modes of proceeding," the court says that it "embraces the whole progress of the suit, and every transaction in it, from its commencement to its termination, which has been already shown not to take place until the judgment shall be satisfied. It may then, and ought to be, understood as prescribing the conduct of the officer in the execution of process, that being a part of 'the proceedings' in the suit."

The case of *Wayman vs Southard*, just quoted from, had reference to the conduct of the marshal in obeying a writ of execution. The facts and conclusion, however, are stated so obscurely, that it is not clear, that the language quoted was within the holding. But the same doctri ne was announced in *Bank vs. Halstead*, 10 Wheat., 51. And in *Beers vs. Haughton*, 9 Peters, at page 360, the same doctrine was approved and stated as having been held in *Wayman vs. Southard*, and *Bank vs. Halstead.*

In *Smith vs. Cockrill*, 6 Wall., 757, the court gave the same interpretation to the term "modes of proceeding," holding (pp. 758, 759), that—

"The result, however, is, that the sale by the marshal in not conforming the mode of proceeding in levying the execution, and making the sale, to the state practice, is irregular and void, and the deed to Smith, the defendant, conveyed no title. The civil code of procedure of the territory requiring the appraisal, and sale at two-thirds of the appraised value, was continued in force at the formation of the state, and, consequently, was the mode of proceeding adopted on the introduction of the process act of 1828-1842, and to which the marshal should have conformed in making the sale."

In *Moncure vs. Zunts*, 11 Wall, 416, a similar construction was given to a similar act relating to the mode of proceedings in Louisiana.

At the foot of the report of *Schwabacker vs. Reilly*, 2 Dillon, 127 (pages 128, 129), is this note:

"NOTE—Service of process is a 'mode of proceeding' within the meaning of the act of June 1, 1872, and being so, the mode of service [not the officer by whom made] prescribed by the state law must be followed, and the power of the federal court to prescribe or substitute any other mode is necessarily abrogated. So held by the United States circuit court, for the eastern district of Wisconsin, by Mr. Justice Davis and Mr. District Judge Hopkins: 5 Chicago Legal News, 472."

These authorities convince us that the conduct of the officer in serving these writs was a mode of proceeding under R. S., 914, and hence that his duties, and, if his duties, his resulting liabilities, were such as prescribed by the state law in force at the time. The liabilities, we think, could not but be corollated to the duties.

Moreover, if the liabilities are not to be looked for in the state law, in what law shall they be found? There is no act of Congress, nor any common law of the Union, as distinguished from that of the individual states of the Union, prescribing that if A takes the property of B without warrant, B shall have an action against A therefor. If such a law was in force in Iowa in November, 1884, it must have been a law of Iowa. And if a law of Iowa, it was, of course, subject to all constitutional conditions contained in the statutes of Iowa.

That the law of Iowa should be recognized as the source of the liability is the object of R. S., Sec. 721, above quoted. And in *Wayman vs. Southard*, 10 Wheat., at p. 25, this court, while declaring that this statute, (now R. S., 721,) was not intended to prescribe the conduct of a marshal in serving a writ—in that case a writ of execution—yet said:

"It is true, that if, after the service of an execution, a question respecting the legality of the proceeding should be brought before the court by a regular suit, there would be a trial at common law; and it may be said that the case provided for by the section would then occur, and that the law of the state would furnish the rule for its decision."

In this connection we may say that we do not think the Acts of Congress (now R. S., 915 and 916), providing for remedies by attachment and execution, are intended to embrace the modes of pro-

ceeding thereupon. The first of these acts—that of May 19, 1828, 4 St., 281, Sec. 3—was in these terms:

"That writs of execution and other final process issued on judgments and decrees, rendered in any of the courts of the United States, and the proceedings thereupon shall be," etc., as in the state courts.

But the Act of 1872, (17 St., 197, Sec. 6), relating to attachments, and the Revised Statutes, Secs. 915 and 916, having been enacted after the above cited decisions of this court, did not contain the words, "and the proceedings thereupon." Congress evidently considered it settled by the decisions of this court, that the proceedings upon the writs were governed by the statute now R. S., 914, providing for the "modes of proceeding."

IV.

There is a question in our minds regarding the jurisdiction of this court. But we are unable to find an authority in point, and we suggest the question with diffidence. It has reference to the amount in dispute. The petition claims ten thousand dollars. Judgment was for the defendants. If there were nothing more relating to the amount, jurisdiction would appear. If, however, the evidence most favorable to plaintiff failed to place his damages as high as five thousand dollars, we understand that this court would not entertain jurisdiction.

Gray vs. Blanchard, 97 U. S., 564
Tintsman vs. National Bank, 100 U. S., 6
Banking Association vs. Insurance Association, 102 U. S., 121
The Jessie Williamson, Jr., 108 U. S., 305
Jenness vs. Citizen's National Bank, 110 U. S., 52
Bradstreet Company vs. Higgins, 112 U. S., 227

There is evidence in this case tending to place plaintiff's damages above five thousand dollars, but the evidence shows that *these damages are made up of three several items, no two of which aggregate five thousand dollars, and one of which can not properly be joined with the other two.*

Defendant Perkins, the United States marshal, had no personal connection with the transactions. Defendants, Thrift and Hopkins, were his deputies.

Defendant Hopkins, having in his hands two writs of attachment, issued out of the circuit court at Dubuque, against the property of H. P. Lane, one in favor of Kellogg et al., and the other in favor of Wells et al., went to New Albin, and served the same, by taking, upon each, separate parcels of goods. The highest valuation placed upon these goods, as shown anywhere in the record, is that of the inventories (Fol. 119), to-wit:

Kellogg inventory	$1,509.07
Wells inventory	2,655.57
Total	$4,164.64

About the time that Hopkins finished the taking of goods upon his two writs, Thrift came to New Albin with a third writ, in favor of King et al., which he proceeded to serve by taking still a third parcel of goods. The highest valuation placed upon this parcel is that of the (Fol. 119)

King, inventory	$2,155.39

It will thus appear that Deputy Hopkins did acts for which plaintiff claims damages against him and his principal, Perkins, in an amount not exceeding $4,164.64; and Deputy Thrift did acts for which plaintiff claims damages against him and his principal, Perkins, in an amount not exceeding $2,155.39. Unless, therefore, the cause of action against Hopkins and Perkins can be joined with the cause of action against Thrift and Perkins, it seems to us that plaintiff does not stand before this court in any better position than if he had brought two separate suits, one against Hopkins and Perkins for $4,164.44, and the other against Thrift and Perkins for $2,155.39. If there had been two suits this court would not have had jurisdiction of either.

The provisions of law for joinder of actions are found in the Code of Iowa, Sec. 2630:

"Causes of action of whatever kind, where each may be prosecuted by the same kind of proceedings, provided that they be by the same party and against the same party in the same rights, and if suit on all may be brought and tried in that county, may be joined in the same petition."

Under this section the Supreme Court of Iowa has held that though an action on an account and an action on a promissory note may be joined, yet an action against A. R. Dickey and F. N. Dickey, on an account, cannot be joined with an action against

A. R. Dickey, F. N. Dickey and John Stewart, on a promissory note. *Thorpe Bros. & Co. vs. Dickey et al.*, 51 Iowa, 676.

And in *Addicken vs. Schrubbe*, 45 Iowa, at pp. 316, 317, the same court said:

"If the pleadings had been drafted in accord with the facts proved the first count would have shown a separate cause of action against one defendant, and the second count a cause of action against both defendants. This would have presented for trial a joinder of causes of action not allowed even under the code."

The misjoinder in the case at bar appearing, not in the petition but in the evidence, and the court below having directed a general verdict for the defendants, the defendants obtained relief against the misjoinder, in the Circuit Court, in the appropriate manner, and, accordingly, they are not now suggesting the fact of the misjoinder, for other purpose than that of determining the jurisdiction.

Counsel may contend that there is evidence tending to show that the goods taken by Hopkins were worth between $8,000 and $9,000 (Fol. 52).

But we think it perfectly obvious that this testimony refers to the value of the entire stock of goods, on the theory that Hopkins took the whole stock by virtue of demanding and receiving the key and locking the door of the store over night. (Fols. 51, 72).

And we think there can be no doubt that the circumstances were not such as to charge Hopkins with taking the whole stock. The facts, which appear without conflict of testimony in several places in the record, are concisely stated by Mr. Hopkins, at Fols. 112 and 113:

"I got there after dark, and I made my business known to that gentleman there. We talked the matter over. It was a very cold night, and we thought we couldn't work to any advantage, but would commence early in the morning. I saw a large crack in the stove and I said to them that it looks a little careless to leave it in that way, so we fixed the stove, and I would have to put a man in there; so I took posession of the keys. They handed them over to me and the next morning we went to work, and I hired Mr. Bock (the plaintiff) and Mr. Rawson and another man, named Joe. I had the conversations the night before with Bock. The balance of the goods I had not taken on these two writs, were taken by Mr. Thrift. He came with a writ and took them just about the time that I got through with the two writs before that that I had, and had the goods boxed up."

V.

Regarding the jurisdiction of the Circuit Court, we will say that the cause was removed from the state court under the act of March 3, 1875 (18 St., 470), upon the ground that it is a case "arising under the Constitution or laws of the United States."

It is, we think, a case "arising under the Constitution or laws of the United States."

Buck vs. Colbath, 3 Wallace, 334
Houser vs. Clayton, 3 Woods, 273
Ellis vs. Norton, 16 Federal Reporter, 4

Buck vs. Colbath, 3 Wallace, 334, like the case at bar, was an action against the United States marshal for taking goods, alleged to belong to A, upon a writ of attachment against the property of B. The defendant, the marshal, in that case, as in this, relied for his defense upon the fact that he was marshal and held the goods under the writ in the attachment suit. That case was brought to this court upon a writ of error to the Supreme Court of Minnesota. This court took jurisdiction of the writ of error on the ground stated as follows, (3 Wallace, 340):

"There seems to be no reason to doubt that the case comes within the provisions of the 25th Section of the Judiciary Act. The defendant claimed the protection of 'an authority exercised under the United States,' and the decision was against the protection thus claimed; or, in other words, against the validity of that authority, as a protection to him in that action."

A moment's reflection will disclose the fact that the decision in favor of the jurisdiction of this court in *Buck vs. Colbath*, includes the proposition that *Buck vs. Colbath* was a case arising under the Constitution or laws of the United States. For, neither the jurisdiction of this court, nor the power of Congress to enact the 25th Section of the Judiciary Act can be sustained, with respect to the case, unless it be a case embraced in the following language of Article III., Section 2, of the Constitution of the United States, viz:

"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States," etc.

Buck vs. Colbath, therefore, must be considered as held by this court to have been a case "arising under this Constitution," or "the Laws of the United States." And if *Buck vs. Colbath* was

within the language of the Constitution, "arising under this Constitution," or "the Laws of the United States," it would be within the language of the removal act, "arising under the Constitution or Laws of the United States," and so is the case at bar, which, as to its facts respecting the point now under discussion, is identical with *Buck vs. Colbath.*

Houser vs. Clayton, 3 Woods, 273, is sufficiently set forth in the opinion in *Ellis vs. Norton*, which we give in full below:

Ellis vs. Norton, 16 Federal Reporter, 4, like the case at bar, was an action against the United States marshal for the taking of goods alleged to belong to A, upon a writ of attachment against the property of B. In that case, like that at bar, the acts complained of were done, not by the marshal himself, but by his deputy. That case, like the case at bar, was begun in the state court and removed to the circuit court.

We give the opinion in full.

"PARDEE, J. The question presented by the motion to remand is whether the case arises under the laws of the United States. If it does so arise, then the cause was properly removed to this court. 'Cases arising under the laws of the United States are such as grow out of the legislation of congress, whether they constitute the right or privilege or claim or protection or defense of the party in whole or in part by whom they are asserted.' A part of the plaintiff's case, in this action is to make Norton, marshal, liable for the acts of his deputy, Clark. If Norton is liable, such liability arises under the laws of the United States and must be tested by such laws. In part, the defense of Norton, marshal, for the alleged trespass, is in justification under process from the United States circuit court. The validity, force, and effect of such process must be settled by the laws of the United States in reference thereto. So that it appears that the case for each party to this action is one that, under the rule aforesaid, arises under the laws of the United States.

It is not disputed by counsel, and seems to be settled by the supreme court of the United States, that cases of trespass against United States marshals in the state courts, where the marshals claim to have been acting under process from the federal courts, and the decision of the state courts are against the validity of the process, may be carried by writ of error to the supreme court, and then be reviewed under section 709, Rev. St. See *Buck* v. *Colbath*, 3 Wall. 334.

In the case of *Houser* v. *Clayton*, 3 Woods, 273, in a similar case to this now under consideration, Justice BRADLEY said:

'The defendants justify the alleged trespass under the authority of a court of the United States, and under the laws thereof. ' This

presents a case arising under the laws of the United States, and is within the terms and meaning of the second section of the act of congress approved March 3, 1875, entitled 'An act to determine the jurisdiction of circuit courts of the United States, etc., 18 St. 470. Such a defense set up in a state court and overruled there would clearly entitle the defendant to carry the case by writ of error to the supreme court of the United States, both under the twenty-fifth section of the old judicial act, and under the act of 1867, passed in lieu thereof. But the only ground on which it could then be made reviewable by that court, is that it is a case arising under the constitution or laws of the United States; and if it is such a case, then it is removable to the circuit court of the United States under the second section of the act of 1875, *supra.*'

The first clause of the second section of the third article of the constitution of the United States defines and limits the judicial power of the United States. The provision therein that it 'shall extend to all cases in law and equity arising under this constitution, the law of the United States, and treaties made,' etc., is the authority from which must be derived the jurisdiction of the supreme court to review such cases by writs of error. It is clear that such cases do not arise under the constitution nor under treaties. If they do not arise under the laws of the United States, the supreme court could not review them. Therefore, upon principle and authority, we hold that this case under consideration is one arising under the laws of the United States, and therefore removed properly to this court.

The earnest and ingenious argument by the learned counsel in favor of the motion to remand has induced us to fully examine the question involved, but we think that the motion might well have been refused on the sole authority of *Houser* v. *Clayton*, *supra.*

The motion to remand is denied.

McCORMICK, J., concurs."

VI.

Upon the points made by plaintiff in error it may be said further:

a. This assignment cannot be aided by oral evidence of the intent of the grantor, nor by the acts of the parties. The assignment must be in writing, in order to be recorded, as provided by Code, Sec. 2117. ("* * * Every assignment shall be duly acknowledged, * * * and, recorded, * * *"), and like other writings, cannot be varied or contradicted by oral testimony.

b. There is no requirement in the law of Iowa that all assignments are to be general. Plaintiff in error concedes the unques-

tionable fact that partial assignments are permissible in Iowa. This instrument, besides being partial, departs from the statute in several particulars. This instrument selects the court and prescribes important particulars of the execution of the trust. The statute, on the other hand, permits the assignee to select the court and leaves all the particulars of the execution of the trust to the assignee, subject to the order and supervision of the court or judge.

SEC. 2118. The assignee shall also forthwith file with the clerk of the district or circuit court of the county where such assignment shall be recorded, a true and full inventory and valuation of said estate, under oath, so far as the same has come to his knowledge, and shall, then and there, enter into bonds to said clerk, for the use of the creditors, in double the amount of the inventory and valuation, with one or more sufficient sureties, to be approved by said clerk, for the faithful performance of said trust, and the assignee may thereupon proceed to perform any duty necessary to carry into effect the intention of said assignment.

SEC. 2123. The assignee shall at all times be subject to the order and supervision of the court or judge, and the said court or judge may, by citation and attachment, compel the assignee, from time to time, to file reports of his proceedings, and of the situation and condition of the trust, and to proceed in the faithful execution of the duties required by this chapter.

c. There are *errata* in the quotations from the Code of Iowa, printed at page 15 of the brief for plaintiff in error. Section 2115 has "general" for its second word, beginning thus: "No general assignment," etc. We have printed the section correctly at top of page 10 of this brief.

Section 2123 did not contain the words: "The assignee shall "dispose of all personal property and divide the proceeds." These words were added in 1886—after this suit was brought. The section as it was is correctly printed by us above.

d. There is no rule of grammar by which the words of this instrument, "or intended so to be," can be referred to the most remote antecedent, viz: "more particularly enumerated and described." The rule is that they should be referred to the nearest antecedent, viz: "marked Schedule A." And if, by any possibility, this antecedent could be passed, the next nearest would be "hereto annexed."

e. Upon such of the Iowa cases as are relied on by plaintiff in support of what seem to be material points, we make the following notations, taking the cases in the order in which they are cited by plaintiff.

Schaller vs. Wright, 70 Iowa, 667, was an action to set aside a conveyance to the wife of the assignor made at the same time with an assignment. A demurrer to the petition was held to have been properly overruled.

Loomis vs. Griffin, 78 Iowa, 482, held that a creditor who did not file his claim within the three months required by law could not participate in the distribution under an assignment. In that case the terms of the assignment referred to personal property and the court said that in the absence of a showing that the assignor owned real estate, the instrument would be presumed to include all the assignor's property.

In *Barney vs. Miller*, 18 Iowa, 460, there was a deed of "all "and singular the right, title, interest, property and estate of the "said parties of the first part, in and to all those lands not hereto- "fore sold and conveyed by them, known as the Half Breed Tract, "especially all and singular the lots and parcels of land in said "Half Breed Tract, particularly described as follows,"—setting out a large number of tracts of land and lots, but not the lot in controversy. This deed was held not to pass the lot in controversy. We have not relied on the case, however, because the court, while saying that the most reasonable construction of the deed is against the conveyance of the lot, yet passes that question, and places its decision on another ground.

Lampson et al. vs. Arnold, 19 Iowa, 479, in so far as it might otherwise have been an authority for plaintiff in the case at bar, is expressly distinguished and controlled by *Van Patten & Marks vs. Burr*, 52 Iowa, at pages 522, 523, one of the cases relied on by defendants.

In *Lyon vs. McIlvaine*, 24 Iowa, 9, the assignors "were resi- "dents of, doing business, and made the assignment in the State "of Illinois, where preference to creditors is alleged to be allowed." The court says: "What we hold is, that the mortgage of property "situated in this State is not rendered invalid by the execution, "on the same day in another State, of a general assignment with "preferences, of property in such other State," (p. 13). The al-

lusion to *Lampson vs. Arnold*, at most a *dictum*, must be regarded as now incorrect under the direct ruling in *Van Patten & Marks vs. Burr*, 52 Iowa, 523, above mentioned.

Parry vs. Vezina, 63 Iowa, 25, was determined by a stipulation of the parties "that, when the said Vezina made the said mortgage "to said Irwin, said Vezina did not contemplate making the as- "signment which he did afterward make on the same day." (p. 27.)

In *Farwell vs. Jones*, 63 Iowa, 316, the court says: "But the "direct and positive evidence in the case is that the mortgages "were made in the forenoon, and that Jones did not then contem- "plate making an assignment," (p. 318).

In *Gage & Co. vs. Parry*, 69 Iowa, 605, the court says: "The "undisputed evidence is that Morris & Humphreys did not con- "template making a general assignment when they executed the "other instrumests," (p. 610).

In *Aulman vs. Aulman*, 71 Iowa, 124; *Southern White Lead Co., et al. vs. Haas et al.*, 73 Iowa, 404, and *Garrett vs. Brulington Co.*, 70 Iowa, 703, there was no instrument purporting to be a general assignment. There were certain mortgages or other items of security, to certain creditors, which the court held did not, under the facts in the cases, constitute general assignments.

DAVID B. HENDERSON,
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FRANCIS B. DANIELS,
For Defendants in Error.

Office Supreme Court U. S.
FILED,
MAR 17 1891
JAMES H. McKENNEY,
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 285.

W. O. BOCK, ASSIGNEE OF H. P. LANE, PLAINTIFF IN ERROR.

vs.

GEORGE D. PERKINS, W. H. THRIFT, AND TIMOTHY HOPKINS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF IOWA.

MOTION TO DISMISS.

Come now George D. Perkins, W. H. Thrift and Timothy Hopkins, Defendants in Error in the above entitled case, and respectfully move the court that the writ of error in said case be dismissed, for that, as appears from the Record, now printed, security was not taken for the prosecution of the writ of error, or otherwise, as provided in Section 1000 of the Revised Statutes of the United States.

These defendants beg to submit this motion without argument on their part.

DAVID B. HENDERSON,
FRANCIS B. DANIELS,
Of Counsel for Defendants in Error.

NOTICE OF MOTION.

To Messrs. D. E. Lyon and H. B. Fouke, of Counsel for Plaintiff in Error: Please take notice that the foregoing motion will be submitted to the Supreme Court of the United States on Monday. the 30th day of March, 1891, or as soon thereafter as the court will receive its submission.

David B. Henderson,
Francis B. Daniels,
Of Counsel for Defendants in Error.

Service of the foregoing notice, with copy of the motion as set out above, is acknowledged this day of 1891.

Of Counsel for Plaintiff in Error.